SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1913.

No. [redacted]47

Supreme Court, U. S.
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THE MISSOURI PACIFIC RAILWAY COMPANY,
APPELLANT,

vs.

THE CITY OF OMAHA.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF FOR APPELLANT.

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SUPREME COURT OF THE UNITED STATES.

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No. 327.

THE MISSOURI PACIFIC RAILWAY COMPANY, APPELLANT,

vs.

THE CITY OF OMAHA.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF FOR APPELLANT.

STATEMENT.

This suit was originally instituted in the Circuit Court of the United States for the District of Nebraska, Omaha Division, where it was tried on amended bill of complaint of the appellant herein, which was filed July 18th, 1910. On February 8th, 1911, the trial court entered its decree in favor of the respondent and allowed an appeal to the United States Circuit Court of Appeals to the Eighth Circuit, where on May 20th, 1912, the decree of the trial court in favor of the City of

Omaha and against the appellant was affirmed (Rec., p. 191). July 9th, 1912, an appeal was granted by the Circuit Court of Appeals for the Eighth Circuit for this court (Rec., p. 196), and on the same day the appeal bond of the appellant was approved to operate as a *supersedeas* (Rec., pp. 194-195).

This suit is one brought by appellant to enjoin enforcement of an ordinance of the City of Omaha requiring appellant to construct a viaduct over and across its line of railway and along Dodge street, one of the streets of the City of Omaha. On January 26th, 1909, the City Council of the City of Omaha passed Resolution No. 344, directing the City Engineer to prepare preliminary plans for a viaduct on Dodge street in said city from a point at or near the east curb line of Forty-sixth street and to submit same to counsel at the earliest possible moment and estimate of cost (Plaintiff's Exhibit 9, Rec., p. 171). On July 20th, 1909, the City Council passed an ordinance known as Ordinance No. 6789 (Rec., p. 5), in which the necessity for the safety and protection of the public, of a viaduct along Dodge street, beginning at a point at or near the east curb line of Forty-sixth street and extending over the railroad tracks of the Omaha Belt Railroad (railroad of appellant) in the City of Omaha, Nebraska, was declared, and by which it was further provided, "that the general plans and specifications for the construction of a viaduct along Dodge street, as herein outlined, that approaches thereto, as prepared and submitted by the City Engineer of the City of Omaha under and in pursuance of the provisions of Resolution No. 344, approved February 1, 1909, be and the same are hereby approved and adopted." This ordinance was on July 26th, 1909, vetoed by the Mayor of the City of

Omaha (Rec., p. 6) but was on July 28th, 1909, passed by the City Council over the Mayor's veto. Thereafter, on March 29th, 1910, the City Council of the City of Omaha passed Ordinance No. 7072 (Rec., p. 7), which ordinance was approved by the Mayor of said city on April 4th, 1910 (Rec., p. 8).

Ordinance No. 7072 ordered appellant to erect, construct and complete a viaduct and approaches in, upon and along Dodge street in said City of Omaha of the width, height, strength and of the material and manner of construction required by the City Engineer of the City of Omaha and specified according to the plans and specifications prepared by him and on file in his office and theretofore approved by the Mayor and City Council of said city.

The ordinance further required that this appellant commence the erection and construction of said viaduct and approaches thereto not later than May 1st, 1910, and fully complete the same on or before January 1st, 1911. Appellant thereupon instituted this suit, filing its amended bill of complaint upon which the suit was tried, on July 18th, 1910 (Rec., pp. 3-14).

This bill (Rec., pp. 3-14) alleges that the complainant operates a line of railway from the City of St. Louis, in the State of Missouri, through the States of Missouri, Kansas and Nebraska, having one of its termini in the City of Omaha in the last named State, and that over this line it operates its business as a common carrier engaged in interstate commerce. Prior to the extension of the corporate limits of the City of Omaha over the territory embracing the location of the proposed viaduct, a right-of-way had been acquired by the predecessor of the complainant, and a railroad had been constructed and has ever since been operated;

subsequently the corporate limits of the city were extended, so as to include the tract through which the railroad was located, and afterwards Dodge street, the highway along which the viaduct was required to be constructed, was extended over the railroad crossing. Since that time the crossing has been operated at grade. The bill further alleges that all necessary precautions, by way of maintaining watchmen, and an electric light over the crossing, have been taken by the railroad company; that the crossing is on the outskirts of the City of Omaha, where the traffic is light and danger of collision very seldom arises, and no necessity exists for the construction of a viaduct or for the taking of any additional safety precautions.

Notwithstanding this, however, the bill alleges, on July 20, 1909, the City of Omaha passed an ordinance declaring the necessity of constructing a viaduct along Dodge street, in conformity with plans and specifications prepared and submitted by the City Engineer of the City of Omaha, under a resolution of the City Council passed on the first of the preceding February (Rec., p. 4). Afterwards, on the 4th of April, 1910, the Council passed an ordinance (Rec., p. 7), requiring The Missouri Pacific Railway Company to erect, construct and complete a viaduct, including approaches, upon and along Dodge street from a point at or near the east curb line of Forty-sixth street, to a point approximately 180 feet east of the Saddle Creek sewer right-of-way. The ordinance provided that the viaduct and its approaches should be of the width, height and strength, and of the material and manner of construction, required by the City Engineer of the City of Omaha, and substantially according to the plans and specifications prepared by him and on file in his office, and thereto-

fore approved by the Mayor and City Council. The ordinance directed that the railroad company should commence the erection and construction of the viaduct not later than May 1st, 1910, and fully complete the same on or before January 1st, 1911, and defray the entire cost thereof.

The objections to the validity of the ordinance, as set forth in the bill, may be summarized as follows:

1. The ordinance required the railroad company to construct a viaduct of sufficient width and strength to sustain the traffic of a street railway system operating on Dodge street, and whereas a viaduct, sufficient to safeguard the ordinary traffic of the street, could be constructed at a cost of about $30,000, the cost of the viaduct required by the city would be approximately $80,000, the increase being largely due to the requirements for the street car traffic. It was alleged in the bill that this demand on the part of the city amounted to the confiscation of its property to the extent of the increased cost, and constituted the taking of its property without compensation, for the benefit of another common carrier, and without due process of law, contrary to the constitution of the United States of America.

2. The bill complains that whereas a viaduct about 600 feet long would be sufficient in every respect to carry the traffic of Dodge street over the railroad crossing, including even the traffic of the street railway company, yet the City, by its ordinance, sought to compel the railroad company to construct a viaduct 810 feet long, the extention being made necessary for the purpose of carring the Dodge street traffic, including the street railway, over a proposed boulevard, which the city might thereafter decide to lay out and estab-

lish across Dodge street, about 350 feet east of and parallel with the line of the railroad, and that this attempt on the part of the city to compel the railroad company to construct the viaduct over the proposed public boulevard, likewise violated its constitutional rights.

3. The ordinance in question, construed in connection with the proposed plans, required the railroad company to construct a viaduct along the south side of Dodge street, leaving the north side of the street open to public traffic, in the same manner as before the construction of the viaduct, except only that the street railway traffic would be carried over the surface of the viaduct; and the railroad company contended that the city could not, at one and the same time, declare the railroad crossing dangerous, so as to justify the construction of the viaduct, and permit it to remain open as before to the public traffic on the street.

4. The ordinance is void for uncertainty, in that it does not itself indicate either the width, height, or manner of construction, as required by the statute from which the City Council derives its power to enact the ordinance, but refers to certain alleged plans and specifications, and an examination of such plans and specifications discloses that through blunders and misunderstanding among the city officials, there were not in existence plans and specifications capable of being followed in such manner as to comply with the ordinance.

5. The ordinance was void because it required the railroad company to commence the erection and construction within twenty-six days after the passage of the ordinance, and it would have been a physical impossibility to commence such erection and construc-

tion within the period allowed, even if there had been in existence definite plans and specifications indicating the manner of construction, and that, as a matter of fact, through the failure of the city officials to carry out the terms of the ordinance, the railroad company had no knowledge of even the insufficient plans, until about eight days before the time set for the commencement of the work.

In so far as the ordinance infringed upon the constitutional rights of the railroad company, and in so far as it is otherwise so unreasonable as to be invalid in law, the prayer of the bill is that the city be enjoined from attempting to enforce the ordinance, and from collecting the penalty provided by the State statute for a failure to comply therewith.

The answer of the city (Rec., pp. 14-24), aside from disposing of some formal matters, admits that it was the purpose of the ordinance to require the railroad company to construct a viaduct, sufficient to carry the traffic of the street railway company over the railroad crossing, and also admits that the unusual length of the viaduct was for the purpose of carrying the Dodge street traffic over the proposed city boulevard, and it asserts the right to impose both of these additional burdens upon the railroad. It seeks to justify the provision for the construction of the viaduct on the south side of the street only, and the maintenance of a grade crossing on the north side, because some of the abutting property owners would be inconvenienced if the grade crossing should be closed. It impliedly admits that the plans and specifications were incomplete, but suggests that the railroad company might itself propose plans and specifications for the approval of the City Engineer and the City Council, and finally, it de-

nies that it would be impossible to construct a viaduct within the time fixed in the ordinance.

The answer further alleges that at the particular crossing in question there is considerable business carried on, that the surrounding country was a settled residence portion of the City of Omaha, that a few blocks beyond the location of the proposed viaduct is the town of Dundee, Nebraska, with a population of about eleven hundred inhabitants, and that a large number of the street cars constantly pass over this crossing between the hours of five o'clock a. m. and one o'clock a. m. of the following day. It denies all other material allegations of the bill and alleges that the plans and specifications were sufficient to notify the appellant of the strength, height and length of the proposed viaduct, and the materials out of which it should be built were sufficient to enable appellant to proceed with the construction thereof, and further alleges that the City of Omaha was willing to give appellant additional information with reference to construction of said viaduct at any time, and that the ordinance ordering the viaduct only required appellant on or before the date fixed in the ordinance to begin the preliminary work necessary for the construction of the viaduct and not the actual erection of the viaduct itself. The answer further alleges that the city does not by said ordinance undertake to require appellant to build a viaduct greater in size and strength or length than is reasonably necessary to accommodate the ordinary street traffic, and to meet the needs of the public, and of no greater size and dimensions than will be necessary to render Dodge street suitable for public travel.

The opinion of the trial court (Rec., p. 174) held with

the city on all issues, and dismissed the bill. It expressly decided that the City of Omaha has the power, under statutory provisions, to compel the railroad company to construct a viaduct, the principal purpose of which is to enable the traffic of the street railway company to be carried over the crossing, even though it involves a radical increase in the cost of construction. The trial court also held that the action of the city in extending the viaduct over the proposed city boulevard was not improper, and that this extension was made necessary by the grades, and was not the result of a purpose on the part of the city to impose on the complainant the cost of carrying the street traffic over the city boulevard. It decided that the city need not close grade crossings, when it requires the construction of a viaduct. It did not find that the railroad company might have commenced the actual erection and construction of the viaduct within the time limited, but that it might have proceeded in good faith to take some steps towards its erection, and held that, if unable to comply with the strict terms of the ordinance, it might thereafter have been relieved from the collection of the penalties by applying to a court of equity. It further found that the requirements of the ordinance, taken in connection with the plans and specifications, were not so indefinite that the viaduct might not have been constructed.

From the decree of the trial court an appeal was taken to the United States Circuit Court of Appeals for the Eighth Circuit and *supersedeas* allowed (Rec., p. 181).

The opinion of the Circuit Court of Appeals (p. 186) was delivered by Judge Hook and concurred in by

Judge Adams, and affirmed the decree of the trial court and sustained the views of the trial court on all points in the case. A dissenting opinion (Rec., p. 189) was filed in the case by Judge Sanborn, the third member of the Court which heard the case in the Court of Appeals, which dissenting opinion sustained the principal contentions of the appellant.

SPECIFICATION OF ERRORS.

I.

The Court erred in deciding that the city has power to compel appellant to construct a viaduct of greater width and strength than is necessary to provide for ordinary street traffic, for the purpose of providing for the traffic of the street railway company over said viaduct (Assignments of Error 1, 2 and 3, Rec., p. 193).

II.

The Court erred in deciding that the city has power to require appellant to construct the proposed viaduct to an unnecessary length for the purpose of carrying the street traffic of Dodge street over a hypothetical boulevard proposed to be constructed by the city at some time in the future, parallel to appellant's track and some distance therefrom (Assignments of Error No. 4, Rec., p. 193).

III.

The Court erred in deciding that the city has power to compel appellant to construct a viaduct over its tracks, while at the same time the city requires the keeping open of a dangerous grade crossing at the same point under or alongside of such viaduct (Assignments of Error No. 5, Rec., p. 193).

IV.

The Court erred in deciding that Ordinance No. 7072 of the City of Omaha was not void for uncertainty and

for impossibility of compliance with its requirements (Assignments of Error 6, 7 and 8, Rec., p. 193).

V.

The Court erred in affirming the decree of the Circuit Court dismissing appellant's bill and in holding that appellant's bill was without equity (Assignments of Error 9 and 10, Rec., p. 194).

BRIEF OF ARGUMENT.

INTRODUCTION.

At the outset of the presentation of appellant's case, it is desired to emphasize one point. No contention is here raised by appellant that the City of Omaha has not the power to require the construction by appellant of a viaduct across appellant's tracks at the point described in the foregoing statement. However much appellant might desire to raise such a contention, that point is foreclosed. The issue in this case, therefore, is not whether the city had, primarily, power to compel the construction of a viaduct, but whether, in this instance, in the attempted exercise of a power which, properly exercised, it undoubtedly does possess, the city acted in such a manner as not to infringe upon the constitutional rights of appellant. This point is emphasized at the outset, in order that there may be no misunderstanding as to the position of appellant at any future stage of the argument.

I.

The court below erred in deciding that the city has power to compel appellant to construct a viaduct of greater width and strength than is necessary to provide for ordinary street traffic, for the purpose of providing for the traffic of the street railway company over said viaduct.

By the first, second and third assignments of error (Rec., p. 193) the attention of this Court is directed to the error of the lower court in holding that the city had the power to compel the railroad company to construct

a viaduct of sufficient width and strength to enable the traffic of the street railway company to go over same, and its error in holding that this action on the part of the city did not constitute the taking of the property of the railroad company without compensation, and in holding that it did not constitute the taking of the property of the railroad company without due process of law, in violation of the rights guaranteed to the railroad company by the fourteenth amendment to the Constitution of the United States.

The bill alleges, and the answer admits, that the principal purpose of the action of the city in demanding the construction of the viaduct, was to provide for the traffic of the street railway company. The answer avers that the majority of the traffic over the crossing is street railway traffic. The evidence shows that over ninety per cent of the traffic consisted of street cars, which pass this crossing 288 times a day (Rec., pp. 73, 74, 76).

The witness, C. E. Smith, Bridge Engineer of the Missouri Pacific Railway Company, testified that the construction of a viaduct of the length, height, width and strength demanded by the city ordinance, to enable the street car company to carry its cars over it, would cost about $80,000, whereas, a viaduct of sufficient width, length, height and strength to carry the ordinary street traffic, including the heaviest automobiles, and the twenty-ton steam rollers sometimes using the streets of the city, would cost but $30,000 (Rec., pp. 47, 60, 66, 67).

The witness, George W. Craig, City Engineer of the City of Omaha, testifying for the city, admits that these figures are substantially correct, and that the sole purpose for the requirement of the additional ex-

pense was to take care of the street car line (Rec., p. 99).

Thus, therefore, the question clearly defined in the pleadings, in the evidence, and in the opinion of the Court, is, whether the city, under the power conferred upon it by the Legislature of the State of Nebraska, and within the limitations imposed both on legislatures and municipal authorities, by constitutional provisions, can require the railroad company to so increase the strength, and thereby the cost, of a viaduct made necessary to protect the ordinary street traffic, as to enable a street railway company, operating as a common carrier for hire, under a franchise conferred upon it by law, to carry its traffic, including cars weighing more than thirty-five tons, with a special provision for the effect of impact by the wheels of such cars, and to compel the railroad company to defray all increased cost made necessary by the requirement of such traffic.

Section 7595 of Cobbey's Statutes for 1907, in force then and for more than a year prior to the passage of the ordinance in question, is as follows:

> "To require any railway company or companies owning or operating any railway track or tracks upon or across any public street or streets of the city, to erect, construct, reconstruct, complete and keep in repair any viaduct or viaducts upon or along such street or streets and over or under such track or tracks, including the approaches to such viaduct or viaducts as may be deemed and declared by the Mayor and Council necessary for the safety and protection of the public. Whenever any such viaduct shall be deemed and declared by ordinance necessary for the safety and protection of the public, the Mayor and Council shall provide for appraising, assessing and deter-

mining the damage, if any, which may be caused to any property by reason of the construction of such viaduct and its approaches. The proceedings for such purpose shall be the same as provided herein for the purpose of determining damages to property owners by reason of the grading of a street, and such damage shall be paid by the city, and may be assessed by the City Council against property benefited. The width, height and strength of any such viaducts and approaches thereto, the material therefor, and the manner of construction thereof, shall be as required by the City Engineer, and approved by the Mayor and Council. When two or more railroad companies own or operate separate lines of track to be crossed by any such viaduct, the proportion thereof, and the approaches thereto, to be constructed by each, or the cost to be borne by each, shall be determined by the Mayor and Council. It shall be the duty of any railroad company or companies upon being required as herein provided to erect, construct, reconstruct or repair any viaduct, to proceed within the time and in the manner required by the Mayor and Council to erect, construct, reconstruct or repair the same, and it shall be a misdemeanor for any railroad company or companies to fail, neglect or refuse to perform such duty, and upon conviction of any such company or companies shall be fined one hundred dollars, and each day such company or companies shall fail, neglect or refuse to perform such duty shall be deemed and held to be a separate and distinct offense, and in addition to the penalty herein provided any such company or companies shall be compelled by *mandamus* or other appropriate proceedings to erect, construct, reconstruct or repair any viaduct as may be required by ordinance as herein provided. The Mayor and Council shall also have power when-

ever any railroad company or companies shall fail, neglect or refuse to erect, construct, reconstruct or repair any viaduct or viaducts after having been required so to do as herein provided, to proceed with the erection, construction, reconstruction or repair of such viaduct or viaducts by contract or in such other manner as may be provided by ordinance, and assess the cost of the erection, construction, reconstruction or repair of such viaduct or viaducts against the property of the railroad company or companies required to erect, construct, reconstruct or repair the same, and such costs shall be valid and subsisting lien against such property and shall also be a legal indebtedness of said company or companies in favor of such city, and may be enforced and collected by suit in the proper court."

Although there is in the bill of complaint a formal protest against the constitutionality of such legislation, yet the actual question presented to the lower court, was not whether this statute was valid, and whether under its provisions, a viaduct might have been required by the City of Omaha at the crossing in question, but rather whether the City of Omaha has the right, under the constitution and laws, to require the kind of viaduct which is demanded in this case. *The question, therefore, is not one of the existence of a power, but only of its abuse.*

The railway company, through the testimony of its bridge engineer at the hearing in the lower court, submitted two alternative propositions for the construction of a viaduct, either of which would cost to construct about $30,000, amply sufficient according to the testimony of the complainant, and the admission of the respondent, to have safeguarded and protected all of

the traffic passing over the crossing in question, except only that carried by the street railway company (Rec., pp. 105, 172).

It is now the contention of the appellant in this court, as it was in the lower courts, that it is the duty of the street railway company to provide for its own traffic, since it receives the compensation and enjoys the profits derived from the carrying on of such traffic, and that when, by the exercise of the police power, the city requires the construction of a viaduct by the railroad company over the crossing in question, and thereby makes necessary the construction of a support for the traffic of the street railway company, the latter company should be compelled by law to participate in the construction, to the extent of the added expense made necessary by the requirements of its traffic.

As stated by the lower courts, the constitutionality of a statute in almost identical language was upheld by the Supreme Court of the United States, and in the same decisions the principle was established that the police power of the State is sufficiently ample and unrestrained by constitutional limitations, to permit the city authorities to lay the entire burden of maintaining the viaduct upon only one of the several corporations necessitating its construction.

Chicago, Burlington & Quincy R. R. Co. v. *Nebraska*, 47 Neb. 549;

Chicago, Burlington & Quincy R. R. Co. v. *Nebraska* (on appeal), 170 U. S. 57;

New York & N. E. R. R. Co. v. *Bristol*, 151 U. S. 556.

It is submitted that none of the foregoing cases are in point, in the controversy which now presents itself. *They had to do with the power of the city to compel*

railroad companies to construct viaducts, and not the question whether unreasonable impositions could be laid upon a railroad company, under the guise of protecting a surface crossing.

In the case of *R. R. Co.* v. *Bristol*, 151 U. S. 556, the question was merely whether the railroad company could be compelled by law to meet the entire expense of constructing a viaduct, the size and strength of which were not in controversy, or whether the city should assume part of the burden.

In the Nebraska cases, the principal question was whether subsequent legislation could modify an arrangement entered into by contract between the railroad companies and the city, by which the city had assumed a small portion of the cost of constructing and maintaining a viaduct. Again, the extent and dimensions of the viaduct were not in question.

And in none of those decisions was it held that the power of the city was unlimited as to the extent of the requirements which it could impose upon the railroad company. On the contrary, the Supreme Court of Nebraska, in discussing the general phases of the police power under which it sustained the legislation, seeks to avoid the use of its decision as an authority in the case we are now considering, because it adds (47 Neb. 573):

> "It will not, of course, be contended that the power of the legislature is, in that respect, absolute, or that it may at will impose upon property burdens too unreasonable as to work a practical confiscation. There is, as all admit, a limit beyond which it cannot go, and within which it will be confined by the judicial power of the state."

It was the purpose of this suit, and is now the pur-

pose of this appeal, to ascertain whether there is in fact any limit beyond which the legislative power may not go, and to determine whether, when such limits are ascertained, they have been exceeded in this case.

There is presented in this case the astonishing spectacle of a municipality, acting under the alleged and purported authority of an act of the state legislature, undertaking to require one public service corporation to take from its treasury a very large sum of money for the purpose of enlarging and strengthening a structure for the sole benefit of another public service corporation engaged in the business of transporting passengers for hire and profit by means of a street railway. In the arguments presented by appellee in the lower courts as well as in the opinion of the Court of Appeals (Rec., pp. 186-187), the real point which this state of facts clearly presents for determination has apparently been misconceived. It is respectfully submitted that the question whether or not the operation of a street railway upon a public highway imposes an additional burden or servitude upon the easement so far as the general public or abutting property owners are concerned, is wholly immaterial in this case, as is also the question whether or not the city had a lawful right to grant to the street railway company a franchise to construct and operate its line of road along Dodge street. It is respectfully submitted that the real point in issue is whether the obligation of the city with respect to the maintenance of a highway along Dodge street was such as to require it, the city, to provide facilities for the operation of a street railway thereon and thereover; and if not, whether the city has the power to compel appellant, as an incident to the performance of its legal duty to make safe the crossing

of Dodge street over its tracks, to perform a duty which did not rest upon the city itself and to devote its money or property to the use and benefit of the street railway company. The Circuit Court of Appeals, citing Chicago, Burlington & Quincy Railroad Company v. Nebraska (*supra*), has said that the extensive power conferred by the city by the Nebraska statute has been upheld (Rec., p. 188). It has already been shown that the contention now made by the city, *i. e.*, that appellant may be compelled by it under the purported authority of the Nebraska statute to construct a viaduct at its own expense, for the use and benefit of the street railway company, has not only never been sustained, but has never been presented prior to the institution of the present case. It is respectfully submitted that the only two opinions of courts which can be found in support of this proposition are the opinion of the United States Court for the District of Nebraska (Rec., p. 174) and the majority opinion of the Circuit Court of Appeals for the Eighth Circuit (Rec., p. 186) in the present case. On the contrary, it is confidently asserted that every adjudicated case aside from the present one which has heretofore been before any court, in which a similar contention has been made, has repudiated such contention. The general rule which has been heretofore followed by the few courts in this country to which such a proposition has ever been submitted, is that the duty of a railroad company with regard to the maintenance and repairs of bridges at crossings is not any greater than that of the public authorities charged with the same duty as to other bridges along the highway (33 Cyc., p. 276), and that it is not the duty of a railroad company to strengthen or reconstruct a bridge which is sufficiently strong and

suitable for ordinary highway traffic so as to make it suitable for the general use of a street railway (33 Cyc, pp. 289-290).

The distinction, which is a vital one in this case, between general legislation already fully sustained by the courts, conferring powers upon a municipality, and unreasonable ordinances passed under such general legislation, is well illustrated in the litigation growing out of the attempts of the City of Chicago to enforce regulations upon the Rogers Park Water Company.

This water company had, by the terms of an ordinance contract, acquired a right to operate its water works in the village of Rogers Park, which was afterwards incorporated in the City of Chicago. By an act of the legislature, the city was authorized to prescribe by ordinance the maximum rates and charges for the supply of water. Thereupon the company contested the validity of the legislation, and carried the litigation through the Supreme Court of the United States, where the statute in question was sustained upon general principles of law, in much the same manner as the statute of Nebraska, authorizing the city to compel the construction of viaducts, has already been sustained by the State Supreme Court and the Supreme Court of the United States. (*Rogers Park Water Co.* v. *Fergus*, 178 Ill. 571, 180 U. S. 624.)

Thereafter, in the case of

Chicago v. *Rogers Park Water Co.*, 214 Ill. 212, the question of the reasonableness of an ordinance thereafter passed, pursuant to the statute, came on for consideration before the Supreme Court of Illinois. In holding that the regulations imposed by the ordinance were unreasonable, and non-enforceable, the Supreme Court of Illinois says:

"There is a marked difference between the taking or appropriation of property and the regulation of its use. In the exercise of the power of eminent domain, the state may take the property for the benefit of the public, but, when it does so, it must make just compensation for the property taken; but it has not been held or understood to be the law that the state may, under its power of eminent domain, take the property of the individual, and appropriate or turn it over to the private use of any person, or any number of persons less than the entire public. In the exercise of the police power, the state may require that the individual so manage and control his own property that the public health, public peace, and public welfare may be conserved. Usually the police power is invoked to restrict the owner in those uses of his property which he might have as a matter of natural right, so as to conform to the welfare of established society."

By its answer to this contention on behalf of the railroad company, the city seeks to justify itself upon the ground that the street car traffic is a part of the common, ordinary and necessary traffic on the street in question, that the construction of the viaduct referred to must be of such a character as to close the surface of Dodge street for street car traffic and that it would be impossible to operate cars on the surface, after the construction of the proposed viaduct. The city offers as an additional argument, that the railroad company has been demanding that if a viaduct is constructed over the crossing in question, the surface of the street shall be closed entirely to traffic of any kind. As this demand on the part of the railroad company has not been acceded to by the city, but on the contrary as we shall presently see, the city purposes to permit

the ordinary street traffic to continue at grade, while insisting that the railroad company shall, at its own expense, carry the street car traffic over the viaduct, this particular detail of the argument set forth in the answer of the city would seem to be without avail.

It was one of the contentions of the city in the trial court, that it was without power to enforce upon the street railway company any regulation which it might establish with reference to the construction of this viaduct; that the statutes of Nebraska gave authority to the city to compel the steam railroad to build the viaduct in question, and gave no power to assess any part of the cost to the street railway, and that in omitting to bring the street railway company into the proceedings, it had acted within its statutory powers, and had exhausted them.

It appears that the Omaha & Council Bluffs Street Railway Company now operates a street car system upon the street in question (Rec., pp. 72-78), under authority granted to it by a franchise voted by the people of Omaha, pursuant to the provisions of an ordinance of the city and of the statutes of the state relating thereto (Rec., p. 167). This ordinance, accepted by the company of which the present operating company is the successor, contained the provision (Rec., p. 192):

> "Said company shall at all times be subject to such reasonable regulations in the construction, building, operating and maintaining said cable tramways and street railways, together with the turnouts, connections, turn-tables and other property and appliances thereunto belonging, as shall from time to time be prescribed by the ordinances of said city, or by the statutes of the State of Nebraska. Provided further, that said railway

track, cable tube, turnouts, connections, turntables and appliances shall be so constructed, operated and maintained as to present the least practicable obstruction to the ordinary and public use of said streets, and that they shall, when required, conform to the established grade of said streets as they now are or may hereafter be established, or the established grade thereof may be changed, at such time as in said streets shall be brought to grade."

A section of the statute under which the City of Omaha is governed is as follows (Cobbey's Statutes, 1911, Sec. 7646):

"To regulate the crossing of railway tracks, to regulate the running of railway engines, cars and trucks within the limits of the city, and to make other and further rules and restrictions to prevent accidents at crossings and on tracks of railroads, and to prevent fires from engines; also to regulate and prescribe the time and manner of running street cars within the city, and require the heating and cleaning of such cars, and to fix and determine the fare to be charged."

The constitution of Nebraska provides that no act shall be passed by the legislature granting the right to construct and operate a street railway within any city, without first requiring the consent of a majority of the electors (Cobbey's Statutes, 1911, Sec. 645; Sec. 2, Article XIII, Nebraska Constitution).

The manner in which street railway companies may be organized and may acquire rights upon the street, is prescribed at length in the statutes (Cobbey, 1911, Sec. 10666 *et seq.*). But there is nothing in these provisions which would throw any special light on this

controversy. The Supreme Court of Nebraska has held that notwithstanding the rights which a street railway company may acquire in the streets, by a franchise voted to it by the people, it acquires no contract rights thereby, but is merely authorized and permitted to enter upon the streets, under the statute, and is subject to valid regulations imposed upon it by law and ordinance passed pursuant thereto.

Lincoln Street Railway Co. v. *Lincoln*, 61 Neb. 109;
State v. *Frost*, 78 Neb. 325.

But it is not necessary to determine, in this case, whether the city should have sought and obtained power to order a viaduct to be constructed of sufficient capacity to provide for the street car traffic, and to compel street railway to pay for a portion of such structure, or whether it should order the railroad company to construct the viaduct of sufficient strength to provide for the ordinary street traffic, and give the street railway company an opportunity to join in strengthening and enlarging the viaduct, as a condition precedent to being permitted to operate its cars over it. If, as a matter of law, the railroad company cannot be compelled to contribute to a part of the structure of the street railway system, the question whether the difficulties arising from that situation can be easily solved by the city, or may require some further legislation to enable them to be met with convenience, is not involved in this case. The railroad company asks that it should be protected by the courts from being compelled to give up a portion of its property for the use and benefit of another common carrier engaged, like it, in serving the convenience of the public for its own profit.

Our contention is that the railroad company cannot be compelled to build a tramway, or any part of it, for the street railway, and that, to the extent to which the railroad is required to increase the strength and width and sustaining capacity of the viaduct, to enable the traffic of the street railway company to be safely carried thereon, to that extent the railroad company is assisting in the construction of the lines of the street railway; in other words, the additional strength required in the viaduct is as much a part of the construction of the street railway system as the laying of its cross-ties and of its rails and other portions of the structure upon which its traffic will run. This increased strength in the viaduct is certainly as much a part of the structure of the street railway system, as the concrete base and ballast, with which it supports its tracks on the ordinary streets and which it would not need on the viaduct.

The question whether the legislation of Nebraska has provided a machinery for compelling street railway companies to elevate their tracks at railway crossings is not especially material to the purposes of this argument. The chief question here presented is whether that legislature has the power to compel a steam railway company to bear the entire expense of elevating the tracks of a street railway belonging to another corporation operating a street railway for hire and profit. The fact that, if it were authorized by the legislature so to do, the City of Omaha *might* have operated a street railway itself, which is adverted to by the Circuit Court of Appeals in the majority opinion (Rec., p. 187), has, we submit, no possible relation to or bearing upon the case. That court might, we respectfully submit, as pertinently have offered the observation

that, if proper legislative authority had existed, the city might have built, and either operated itself or leased to others, a steam railroad upon the location now occupied by appellant's tracks crossing Dodge street. The City of San Francisco, California, is operating a municipal street railway; but it is submitted that this fact has no more connection with the issues involved in this cause than does the fact that the City of Cincinnati, Ohio, built and still owns a steam railroad of a good many miles in length.

At no stage of this litigation has any authority been cited to support the proposition that there may be valid legislation requiring a railroad company to construct a tramway for a street railway company, or that under general legislation authorizing municipal corporations to compel the construction of a viaduct when necessary for the safety and protection of the public, there may be added to the burden of the railroad company of constructing a viaduct sufficient to provide for the ordinary and usual street traffic, the expense of so strengthening such viaduct as to sustain the street railway traffic.

On the contrary, there was cited to the trial court, and referred to in its opinion (Rec., p. 176), the case of *Detroit, Etc., Ry. Co.* v. *Osborn*, 189 U. S. 383, in which it was distinctly recognized that the burden of joining in the construction of the viaduct for its own benefit, may justly and properly be laid upon the street railway company.

While this particular question has not elsewhere been considered in any of the national courts, yet the question of the rights of the street railway company in a situation of this kind has been in several instances dealt with in the state courts.

In

Briden v. *R. R. Co.*, 27 R. I. 569, 65 Atl. 315, the statute incorporating the railroad, provided that the road should be so constructed as not to impede or obstruct any highway, and that if the railroad company should raise or lower any highway crossed by it, it should do such work in a manner satisfactory to the town council, which might require of the railroad such alteration as it deemed necessary. Under this statute the railroad company had constructed its track, and in doing so had raised the highway, and constructed a bridge or viaduct over the track, in a manner at that time satisfactory to the town council. Afterward a street railway company obtained authority to establish its tramway along the street which crossed the railroad tracks by means of the bridge in question. Thereupon a demand was made upon the railroad by the Board of Alderman of the city, for the benefit of the street railway company, that the railroad company so increase the strength of the bridge as to enable the heavier traffic of the street railway to be carried over it. The demand not being met, the members of the Board of Aldermen applied to the Court for a writ of *mandamus*. It appeared in the record that the bridge was sufficiently strong to sustain the weight of the ordinary highway traffic of the city, including teams, carts and carriages, but not of sufficient strength to sustain unusual weights, such as road-roller, weighing from 24,000 to 40,000 pounds, nor the street cars authorized to be operated on the street by the ordinance of the city. By the decision of the Superior Court, which is quoted in full in the opinion of the Supreme Court, it was readily determined that the duty of the railroad company to maintain a bridge over

its crossing was a continuing one, and that it would be just as much its duty to strengthen its bridge to meet the changing conditions of the traffic, as it would have been to construct such a bridge to provide for the traffic in the beginning, and the case was not disposed of upon the ground that the railroad company had fully discharged its duty by the first or original construction of the bridge. Having disposed of this point the Court proceeds to discuss the further question, whether the railroad company is at any time required to construct a bridge over its crossing for the benefit of a street railway company, and holds that the duty of the railroad company was to restore the highway, and that in this respect it was merely charged with the function which would have rested upon the city, to maintain a highway at that place if no railroad had been constructed across it; and that no greater duty was cast upon the railroad company by the statute in question. The Court says:

> "The city could not be compelled, if any of its streets were not in suitable condition for street car traffic, to put them in such condition at the demand of a street railway company, and it seems to me that the city is not warranted in demanding that the respondent do more than it, the city, could be compelled to do."

It will be noted that in that case the statute required the railroad company to construct a viaduct, in such manner as the members of the town council might deem necessary. Just as in the Omaha case, the height, width, and manner of construction of the viaduct, is such as may be ordered by the City Council. There is no difference in principle in the two cases.

Upon appeal by the city, the Supreme Court held

that it approved so much of the opinion as held that the city had no standing to insist upon alterations for the benefit of the street railway, for the reason that it was not the duty of the city to furnish structures for the operation of street railway traffic, and therefore the city could not lay that burden upon the railroad.

In

People v. *Adams*, 88 Hun. 122,

a decision of the Supreme Court of New York, but affirmed by the Court of Appeals without an opinion, in 147 N. Y. 722, the question arose likewise on the liability of the railroad company to defray the additional expense incurred in strengthening a viaduct over its track, to provide for the traffic of a street railway company. And while this was disposed of largely as a question of a right to levy a special assessment upon the railroad under the statute which was invoked, yet the Court goes further, and inquires into the reasonableness of a law which would require the railroad company to provide for a street car traffic. The Court says:

> "The city officers simply determined that the structure must be built strong enough to carry the heavy cars of the street railway company, which no ordinary bridge could sustain, and which it was not in the contemplation of the statute that the relator should be required to build. This statute * * * like all other statutes, should receive a reasonable construction. The legislature certainly did not intend thereby to impose upon the railroad company, in constructing its crossings over the numerous streets in the city that its tracks should intersect, the building of structures that would withstand such enormous weight, which

is far beyond that of the vehicles that ordinarily pass over the streets and highways."

And this ruling of the New York court goes to the very heart of this controversy. It was there held that the statute would not be so construed as to require the railroad company to meet this expense, because such a requirement would have been unreasonable. The Court invokes the doctrine of reasonableness, to aid it in the construction of the statute. There is no doubt, in the case at bar, that the ordinance of the city requires the railroad company to build a bridge for the use of the street railway traffic, but it is attempting to justify this action under the general provision of the State Legislature which only authorizes the construction of viaducts for the safety and protection of the general public. And if we apply to the act of the Nebraska Legislature the same test as to its construction, which the New York court applied, we have a right to say that it did not intend that under such a statute, the city should have power to compel the railroad company to expend money for the benefit of the street railway, and therefore, so much of the provisions of the ordinance as impose this requirement, is not authorized by law and is void.

In

Carolina Central R. R. Co. v. *Wilmington Street Ry. Co.*, 120 N. C. 520,

the railroad company, at the time of constructing its line, built a bridge over a crossing, which, at the commencement of the litigation, was admittedly sufficient for the ordinary purposes of travel by foot and horse and vehicle. The street railway company, having obtained permission to operate on that street, commenced

to run street cars over the bridge, but refused to unite with the railroad company in maintaining the bridge and strengthening it to sustain the increased traffic. Thereupon the railroad company brought a suit to enjoin the street railway from using the surface of the bridge without first complying with the demand to join in increasing its strength. In this litigation it was the contention of the street railway company that its use of the street was a part of the ordinary traffic. The Court coincided in its line of reasoning with the Rhode Island court, and held that the duty of the railroad company was a continuing one, and that as the traffic on the city streets increased, it would be incumbent upon the railroad company to meet these changing conditions, even by an additional outlay to increase the strength of its bridges. The Court puts this query:

> "But does the obligation imposed upon the plaintiff extend any further than to maintain a bridge equal to the demands of the public for foot and horse travel and ordinary vehicle transportation? Can the obligation be extended to include the use of the bridge for the running of heavy street cars over it by a corporation formed for the profit of its stockholders and whose chief purpose is private gain and not the public good?"

The Court answers these questions by saying that to state the question is to answer it in the negative, for the reason that the street railways are in a certain sense highways, but not in a strict sense, for their owners have private rights of property in a franchise. The fact that the laying of a street railway track and the running of its cars do not impose an additional servitude upon the abutting owner, does not carry with it the conclusion that such traffic does not impose an

additional servitude upon the bridge. And the Court concludes:

> "The plaintiff company (the railroad) therefore, owes the defendant (the street railway) no duty to furnish at plaintiff's cost and risk a safe passage for defendant's street cars over the bridge to the end that the defendant company may conduct its business, profitable only to its own stockholders, without risk or expense. That would simply be an appropriation of the property of one, to the benefit of another, without compensation, and that could not, of course, be allowed."

In the lower court these authorities were disposed of by the statement that they arose under different statutes, and that the construction should therefore be different. But it will be seen that the North Carolina court bases its ruling, not upon the precise terms of the statute, *but on the fundamental proposition that the property of one person cannot be taken for the use of another.*

In

Conshohocken R. R. Co. v. *Pa. R. R. Co.*, 15 Pa. Co. Ct. 445

(quoted in 33 Cyc 276, Note 3), the same rule of law was enforced by one of the inferior courts of Pennsylvania.

The question involved has been indirectly dealt with, without, however, any definite conclusion being reached thereon, in a few other cases.

In

Pennsylvania R. R. Co. v. *Greensburg Street Ry. Co.*, 176 Pa. St. 559,

where the railroad had a bridge constructed, and at-

tempted, on various grounds, to resist its use by the street railway, the Court held:

> "The appellant did establish one point in which its rights were different from those of the public. The special danger to it and its passengers arising from the use of the bridge for a purpose for which it was not originally built gave appellant a standing to object to such use. It has a clear right to be protected from that danger."

And in disposing of the case the Court imposed this condition upon its decree, that the street railway must first take the necessary steps to increase the strength of the bridge sufficiently to maintain its traffic.

In

Newark & H. R. R. Co. v. *N. J. Traction Co.*, 33 Atl. 475,

on an application for a preliminary injunction, the New Jersey Chancery Court considered whether it would grant to the railroad company a preliminary injunction to prevent a street railway company from laying rails upon a bridge originally constructed by the railroad company to carry the ordinary traffic over the crossing. After stating the question fully, the Court concludes that the inquiry is important, and has not yet been settled by adjudication, and for that reason alone the preliminary injunction will not be granted and the matter so be reversed for the final hearing.

In

West Jersey R. R. Co. v. *Atlantic City Traction Co.*, 65 N. J. Eq. 613, 56 Atl. 890,

the New Jersey Chancery Court considered some general principles which have a decided bearing on this controversy. One of the several corporations, some of

them operating steam railroads, and some of them traction lines, or street railways, brought a bill in equity setting out that the franchises of the various companies over the crossing in question, and over the crossing of other tracks, had brought about a conflict which it was contended the Court, under its general equity powers, was able to adjust and settle. The Court assumes the jurisdiction, and determines the manner in which the crossing shall be maintained and made safe. And in discussing the rights of the various parties to the controversy, the Court says:

> "While it is true that the traction company, with respect to the owner of the fee, is enjoying one of the modes of using the public right-of-way over the land for which the highway was originally taken, yet it is equally true that the trolley company has by its franchise acquired for itself a right to exclude from the habitual use of its tracks all those who may be engaged in competitive business. For this special convenience it affords the public in the use of the highway, it is authorized to charge its passengers a fee for using its cars. The construction of its tracks and the safe passage of its cars over steam railroad tracks in its route are means whereby the traction company acquires this privilege. There seems to be no equitable ground which requires the senior company, presently in occupation, to pay anything to enable the junior company to construct its own crossing in such a manner that it shall not impair rights of the senior company already vested and in enjoyment. It is the duty of the junior company so to build its tracks over the senior company's rails that the crossing may be safe. The junior company has no right to threaten to build them in a dangerous manner,

and to require, as a condition of its change to safe construction, that the senior company shall pay its expenses in building on the safer plan."

It has already been intimated that the adjudicated cases in which a contention of this nature has been passed upon, are few in number. The paucity of these cases we respectfully submit, in and of itself bears the most eloquent possible testimony to the scarcity of instances in which similar attempts have been made to require the appropriation of the money or property of one party for the use and benefit of another. Emphasis has been laid by the Circuit Court of Appeals (Rec., p. 186) on the fact that the Nebraska statutes and the action of the city were an exercise of the police power. We respectfully submit, however, that it has been clearly established by the foregoing argument, that the limit to which the municipality may go in the exercise of the police power in a case of this nature is limited by the duty which rested upon it in the first instance with respect to the maintenance of its highways. We respectfully submit that it needs no further argument to establish the contention that even the police power of the state, however broadly it be considered or construed may not be used to authorize the taking of the property of one party for the use and benefit of another. Such action is contrary to the very foundation principles of organized society and government. As was said by Judge Chase in

Calder v. *Bull*, 3 Dallas 386,

"An act of the legislature (for I cannot call it a law), contrary to the first great principle of the social compact, cannot be considered a rightful exercise of legislative authority. The application of a law in governments, established on express

> compact and on republican principles, must be determined by the nature of the power on which it is founded. * * * The legislature may enjoin, permit, forbid and punish; they may declare new crimes, and establish rules of conduct for all its citizens in future cases; they may command what is right, and prohibit what is wrong, but they cannot change innocence into guilt, or punish innocence as a crime; or violate the right of an antecedent lawful private contract, *or the right of private property.*"

It is cheerfully conceded that the courts in the performance of their duty to confine the legislative department within the constitutional limits of its power cannot nullify a law simply because it conflicts with judicial notions of right or morality, or abstract justice, but as is said by Mr. Tiedeman (1 Tiedeman, *State and Federal Control of Persons and Property*, p. 13), "Wherever by reasonable construction the constitutional limitation can be made to avoid an unrighteous exercise of police power, that construction will be upheld, notwithstanding the strict letter of the constitution does not prohibit the exercise of such a power."

We respectfully submit that the court below erred in holding that the Nebraska statute in question either did or could confer upon the City of Omaha power or authority to compel appellant to construct a viaduct across its tracks and along Dodge street in the City of Omaha of greater width and strength than is necessary to provide for ordinary street traffic, for the sole purpose, as is admitted by the answer of the city to appellant's bill in this case, and as is conceded by the city's own principal witness, its City Engineer, of providing for the traffic of the street railway company.

II.

The Court erred in deciding that the city has power to require appellant to construct the proposed viaduct to an unnecessary length for the purpose of carrying the street traffic of Dodge street over a hypothetical boulevard proposed to be constructed by the city at some time in the future, parallel to appellant's track and some distance therefrom.

The fourth assignment (Rec., p. 193) complains of the holding of the lower court to the effect that the act of the city in endeavoring to compel the railroad company to construct a viaduct which would not only be sufficient to carry traffic over the railroad crossing, including even the traffic of the street railway company, but also to carry the Dodge street traffic, having particular reference to the traffic of the street railway company, over a proposed boulevard, which the city may at some indefinite time in the future decide to construct across Dodge street, at a point several hundred feet east of, and parallel with, the line of the railroad.

The trial court disposed of this objection with the finding that this extension of the end of the viaduct was made necessary by reason of the grades, and the purpose was not to compel the railroad to erect a viaduct over the boulevard.

That this position is utterly without support in the evidence, as well as in the pleadings, will be quite apparent from a slight examination of this record.

By the eleventh paragraph of the complainant's bill (Rec., p. 11) it is averred that by the plan of construction adopted by the city, an extension over 200 feet longer than was necessary would be required "for the avowed purpose of carrying the ordinary street traffic

and the traffic of the street railway company over a portion of the said Dodge street, across which the said respondent intends to cause a part of its boulevard system to be extended" and "to provide a means whereby the traffic along its said boulevard may pass under the said viaduct, and thereby escape crossing the tracks of the street railway company on the same surface."

The answer of the city nowhere denies all the averments of the bill, but in the eleventh paragraph (Rec., p. 19) the city admits that:

> "Complainant is required to construct a viaduct 810 feet long, and denies that one 600 feet long would be sufficient; and defendant alleges that complainant is required to build a viaduct 810 feet long because said railroad company having rendered the crossing at Forty-fifth street and Dodge street dangerous so that the construction of a viaduct has become necessary, the city claims the right and is exercising the right to compel said complainant to construct a viaduct of such length, in such manner and upon such portions of said street as will not interfere with the use of said street for the legitimate purposes for which said city intends, desires and has a right to use such street. That said defendant is not required to permit said company to build a viaduct according to its own ideas or to suit its own convenience or to permit the construction of said viaduct in such a way as to prevent the proper and legitimate use of said streets, highways, parks or boulevards which the city may now or at some future time desire to use in crossing said street either east or west of said crossing. Defendant alleges the fact to be that it has an established system of boulevards throughout the City of Omaha, and that it

is necessary that its boulevards shall consist of one continuous route and that it would prove inconvenient and destructive to permit the end of a viaduct to be built in the street across the line of a boulevard, thus requiring the boulevard to end at the viaduct or to turn two or three hundred feet to the right or left and over ground and along a route unsuitable for boulevard purposes; that said complainant is not required by said ordinance to build a viaduct greater in size, strength or length than is reasonably necessary to accommodate the ordinary street traffic, and to meet the needs of the public, and of no greater size or dimension than will be necessary to render Dodge street as suitable and safe for public travel, and to enable the City of Omaha to lay out and extend its street and boulevards across said Dodge street for the accommodation of the public, as could have been done had the construction of a viaduct not been made necessary by said complainant in rendering said street crossing dangerous."

It will thus be seen that the city admits the averments of the bill, and its avowed purpose in extending the viaduct to such an unreasonable length is to carry the traffic over the proposed boulevard, and it asserts the right to lay this burden upon the railroad company.

In addition to this frank admission in the answer, the city, on the hearing of the case, called as its only witness on this subject, its city engineer, Mr. Craig, who, on cross-examination, testifies as follows (Rec., p. 95):

"Q. You understand that the purpose of lengthening the viaduct, as shown in the alternate plans, was to leave an open space under the viaduct along

the right of way of the Saddle Creek sewer, so that if that should be adapted to a boulevard hereafter, the boulevard traffic could go along under the viaduct and under the traffic of the street railway company?

"A. Yes, sir."

It will thus be seen how little support there is in this record for the finding of the lower court that this 200-foot extension of the viaduct was made necessary in order to procure a suitable grade on its surface.

It is true that in the testimony of the witness, Smith, the bridge engineer, who testified for the railroad company, and in that of the witness, Craig, who testified for the city, some slight difference develops as to grades, but it is not vital to this controversy concerning the boulevard. Mr. Craig admits that by a slight rearrangement of grades, which he states is perfectly feasible and not at all unusual, the viaduct could be shortened without increasing the grade of the approach (Rec., pp. 83-84, 95, 96, 97, 98).

We shall see presently that the only plan of construction ever adopted by the City Council in the manner provided by the statute, under which it was acting, provides for a grade exactly as suggested by Mr. Smith in his testimony, and that by shortening the viaduct, as proposed by Mr. Smith, a grade conforming to the principles insisted on by Mr. Craig could be constructed which would not obstruct the proposed boulevard.

Mr. Smith's testimony, of course, points out distinctly and with the utmost clearness that a viaduct, about 600 feet long, could be constructed which would take care of all the traffic and provide for every contingency, except that it would not carry the Dodge

street traffic over the proposed boulevard (Rec., pp. 40, 41, 56, 57, 105, 173).

In this state of the record there is no justification for disposing of this point, as was done in the lower court, by holding that it was a mere matter of a difference of opinion of engineers as to the proper grade to be used in the approaches to the viaduct. It stands boldly admitted and asserted that the purpose is to compel the railroad company to defray the cost of carrying the street car traffic over the city boulevard.

The authority of the city to compel a steam railroad to construct any viaduct, at its own cost and expense, is derived solely from the police power of the state. As we have already pointed out, the question in this case is not whether this general power, and the Nebraska legislation passed pursuant to it, is insufficient to authorize the passage of an ordinance requiring the construction of a viaduct, but rather, the inquiry is whether there has been in this case an abuse of the power. That the police power of the state is subject to all the limitations of state and federal constitutions, is now so well settled that it is no longer questioned:

Connolly v. Union Sewer Pipe Co., 184 U. S. 540;
Yick Wo v. Hopkins, 118 U. S. 356;
Dobbins v. Los Angeles, 195 U. S. 223;
Mo. Pac. Ry. Co. v. Nebraska, 164 U. S. 403;
City of Belleville v. St. Clair Co. Turnpike Co., 234 Ill. 428;
Schnaier v. Hotel Co., 182 N. Y. 83;
State v. Walker, 48 Wash. 8;
Bonnett v. Vallier, 136 Wis. 193;
Ry. Co. v. Crown Point, 146 Ind. 421;
Ry. Co. v. Connersville, 147 Ind. 277;
Smiley v. MacDonald, 42 Neb. 5;
Wenham v. State, 65 Neb. 394;
In re Anderson, 69 Neb. 686-9;
Halter v. State, 74 Neb. 757.

In *Connolly v. Union Sewer Pipe Co.*, 184 U. S. 540, in holding that an anti-trust enactment of the State Legislature violated the federal constitution, because it applied its prohibitions and penalties to certain classes of industries and not to others, the Court said:

> "It is sometimes difficult to show that a state enactment, having its source in a power not controverted, infringes rights protected by the national constitution."

In *Dobbins v Los Angeles*, 195 U. S. 223, in holding invalid an ordinance of the city passed pursuant to legislative power, conferred on it for that purpose, restricting the territory within which gas works might be erected and maintained, so as to permit an existing gas company to continue, while denying to another company the opportunity to enter the field, the Supreme Court said:

> "It is urged that, where the exercise of legislative or municipal power is clearly within constitutional limits, the courts will not inquire into the motives which may have actuated the legislative body in passing the law or ordinance in question. Whether, when it appears that the facts would authorize the exercise of the power, the courts will restrain its exercise because of alleged wrongful motives, inducing the passage of an ordinance, is not a question necessary to be determined in this case; but where the facts as to the situation and conditions are such as to establish the exercise of the police power in such manner as to oppress or discriminate against a class or an individual, the courts may consider and give weight to such purpose in considering the validity of the ordinance."

In *Yick Wo v. Hopkins*, 118 U. S. 356, the Supreme

Court went even further, and held that although the legislation was valid, and although the ordinance upon its face might be a reasonable exercise of the police power conferred by the statute, yet if it is administered by public authority with an evil eye and an unequal hand, so as practically to make illegal discriminations between persons in similar circumstances, the enforcement of the ordinance would be condemned.

In *City of Belleville v. St. Clair Co. Turnpike Co.*, 234 Ill. 428, the Court clearly distinguished between that function of a sovereign state which consists in taking property for a public use, and that other function whereby the use of property may be restricted and limited so as to prevent the existence or use of the property from menacing the life and safety of the people, and pointed out that it is by the exercise of the right of eminent domain that property may be taken for a public purpose, while it is the police power which imposes reasonable regulations upon the use of property. In the latter case, no compensation will be made to the persons who are compelled to assume expense and to comply with the regulations, while in the former case, the value of the property taken or injured must be paid to the owner before the public purpose can be served by laying the burden in question.

In the case we are now presenting, the city proposed building a viaduct to carry the street traffic, principally the street railway traffic, over the railroad crossing. Its first act in the matter was to pass a resolution directing the city engineer to prepare plans for a viaduct from Forty-sixth street to a point west of Forty-fourth street (Rec., p. 171). The plan submitted by the city engineer, the only plan ever actually approved by the city, as we shall hereafter see (Rec.,

p. 105), designated a viaduct which would accomplish that purpose, but its east end is located on the so-called Saddle Creek sewer right-of-way. It provides for a typical girder construction, necessitating a floor thickness of seven feet, which construction requires an unnecessary length in the viaduct, in order to produce the desired grade. But the city engineer admits that it would have been perfectly permissible and satisfactory to him to have changed this type so as to permit a floor thickness of only two feet, resulting in the shortening of the necessary length of the viaduct to the extent of 150 feet, and preserving the same grade (Rec., pp. 83-84). If this adaptation of the east end of the viaduct had been made, it would have removed all the objections of the present city engineer, both as to the grade and the obstruction of the proposed boulevard by the east end of the viaduct (Rec., pp. 84-85).

But for the avowed purpose of using the statutory provisions authorizing the city to compel the railroad to construct the viaduct, as a means of carrying the street railway traffic over the proposed boulevard, the city by its ordinance ordered the construction of a viaduct whose eastern terminus should be 180 feet east of the Saddle Creek sewer right-of-way, and with the intention of carrying into effect this purpose, the city engineer subsequently prepared plans (Rec., p. 105), although, as we shall see, they were never approved by the City Council, so arranged that the viaduct would be carried east of the proposed boulevard, and there would be a clearance under the viaduct for the future boulevard traffic.

This municipal legislation is doubly vicious; not only does it make use of its opportunity to impose upon the railroad a burden which ought to be borne by the pub-

lic, but it is fair to assume that the act of the city officials in overriding the veto of the Mayor and in determining that a viaduct was necessary over the railroad crossing, was largely influenced by the evident desire to protect the boulevard traffic at the expense of the railroad. It is a wanton confiscation of the railroad property for public use, without the pretense of compensation.

III.

The Court erred in deciding that the city has power to compel appellant to construct a viaduct over its tracks, while at the same time the city requires the keeping open of a dangerous grade crossing at the same point under or along side of such viaduct.

By the fifth assignment (Rec., p. 193) the appellant complains of the error of the Court in holding that the city has power to declare a grade crossing too dangerous to keep open, and for that reason, to order the construction of a viaduct over it at the expense of the railroad company, and at the same time keep the grade crossing open to general traffic.

By the eighth paragraph of the bill (Rec., p. 8), it is alleged that the plans referred to in the ordinance provide that the viaduct shall be constructed on the south side of Dodge street, and that a grade crossing shall be left and maintained on the north side of the street, over the tracks of the railroad company, so that persons traveling along and over Dodge street and across the railroad tracks at their intersection with Forth-fifth street, may, at their option, cross at grade instead of using the viaduct, and the complaint is that while the railroad company will be compelled at great expense to construct a viaduct, yet it will not be re-

lieved of the risk of the grade crossing, if there is any risk, and will be compelled to meet the additional expense of guarding it from the surface traffic, by means of lights, watchmen, etc.

The answer of the defendant in its eighth paragraph (Rec., p. 16) admits that the ordinance and plans contemplate that a grade crosing shall be maintained on the north side of the street. The answer denies that the construction of the viaduct will not relieve the railroad company from the necessity of maintaining a watch at the grade crossing, but there is a failure, either in the answer or in the evidence, to indicate why such a precaution would not continue necessary after the construction of the viaduct.

While, as we shall hereafter see, a careful study of the various ordinances, plans and specifications passed, drawn and prepared by the city officials of the City of Omaha, are so vague and indefinite and self-contradictory to make impossible the construction of any viaduct without violating some portion of the requirements, yet it is conceded on both sides that the demands of the city contemplate the construction of a viaduct on the south side of Dodge street, leaving a twenty-foot paved roadway on the north side, crossing the railroad track at Forty-fifth and Dodge streets, and open to the general public. This roadway would be free to be used by all traffic which now goes on Dodge street, except only the portion carried over the viaduct by the street railway. It is a mere matter of speculation and opinion as to how much of this free traffic would go over the viaduct and how much would continue to cross at grade. It is a matter of common experience, of which the Court may well take notice, that in such a situation the greater percentage of the free traffic will con-

tinue to use the grade crossing and very little of it will go over the viaduct.

The railroad company complains of this action on the part of the city for the reasons that, in the first place, it is contrary to law, as we shall presently consider, and, in the next place, it is a great injustice to the railroad company to compel it to spend such large sums of money to remove the danger of a grade crossing, and at the same time to continue to be subject to all the perils of the traffic at such a crossing. The street railway traffic consists only of passengers in the cars of the street railway company, whose safety can be looked after by the conductor and motorman handling the car. The danger, if any danger exists at such a crossing, is from the collisions which might occur between ordinary vehicles or foot passengers and the trains of the railroad company. It is obvious that this danger is greatly increased instead of being diminished by the construction of the viaduct. The vigilance of the employes of the railroad company, operating engines and trains over the crossing, would inevitably be relaxed by the presence of the viaduct. Unless familiar with the condition from constant usage, the train crew passing the crossing only occasionally, in the traffic of this railroad company, which extends from Omaha to St. Louis, would naturally assume that there was no traffic at the grade crossing and it would be difficult to keep in effect the precautions ordinarily used at such crossings. At the same time, the existence of the structure, its foundations, girders and supports would obscure the vision of both the train crew and the passengers on the street. Hence the construction of the viaduct, while retaining the grade crossing, would increase rather than diminish the danger.

The attitude of the city in explanation of this anomalous state of affairs, sustained by both the trial court and the Circuit Court of Appeals, is that it is necessary to leave a grade crossing for the reason that there are places of business located along Dodge street and under the viaduct whose convenience can better be served by permitting the traffic to continue on the old grade.

But the statute of Nebraska under which the city asserts its power to order the construction of a viaduct contemplates this contingency and provides in a very distinct manner how it should be met.

A portion of the section of the statute already quoted (Sec. 7595 Cobbey's Statutes, 1911) is as follows:

> "Whenever any such viaduct shall be deemed and declared by ordinance necessary for the safety and protection of the public, the Mayor and Council shall provide for appraising, assessing and determining the damage, if any, which may be caused to any property by reason of the construction of such viaduct and its approaches. The proceedings for such purpose shall be the same as provided herein for the purpose of determining damages to property owners by reason of the grading of a street, and such damage shall be paid by the city and may be assessed by the City Council against property benefited."

The provisions for determining damages caused by grading a street, referred to in the foregoing statute, are set forth elsewhere in the statutes of Nebraska, providing for the government of the cities of the metropolitan class, to which Omaha belongs (Secs. 7582-3 Cobbey, 1911), as follows:

> "Sec. 7582. Before the adoption of an ordinance changing the grade of any street or an ordinance

ordering any street or streets reduced to the established grade, the Council shall appoint a committee of at least three members of the Council to make an appraisement of the damages arising from such change of grade or such grading. They shall take into consideration the amount of the special benefits, if any, arising from such change of grade or grading, and shall file their report in writing with the City Clerk within ten days from the date of their appointment. In appraising the damages for grading, they shall exclude any damages resulting from any change or changes of the first established grade.

"Sec. 7583. Any owner of property abutting on said street who files a written protest before the adoption of such report by the Council may appeal within thirty days after the adoption thereof, but such appeal shall not operate to stay the passage of the ordinance change such grade or ordering such grading."

It is obvious that the purpose of the Legislature was to treat the construction of a viaduct as a change of grade of a street. Instead of the established grade being on the present surface of the street where it is crossed by the railroad, it is the design that, after the viaduct has been ordered and constructed, the surface of the street shall be the floor of the viaduct. Neither in the nature of things nor in the provisions of these statutes is there any ground for holding that the property owners on one side of the street shall have a right to maintain the street at its old grade, because it is more convenient to them, while the property owners on the other side of the street shall submit to a street whose surface is twenty to thirty feet higher than formerly. Yet the city in this case declares the necessity

of a viaduct over this railroad crossing, and orders a viaduct constructed on the south side of the street, whose principal function is to carry the street railway traffic, while keeping open the former grade and the surface crossing at the railroad intersection along the north side of the same street.

From another aspect of the case the attitude of the city in endeavoring to leave the traffic free to use the grade crossing, while at the same time ordering the railroad to spend a large sum of money in the extension of the viaduct, becomes so absurd and inconsistent as to amount to a radical abuse of the powers conferred upon the city by the statutes we are considering. While it was held by the opinion of the lower court that the police power conferred upon a city extends to the protection and "convenience" of either the city or the people who use this street or the street railway company. The language of the statute is too clear to permit of such loose construction. It authorizes the city to require the railroad companies to construct any viaduct "as may be deemed and declared by the Mayor and Council necessary for the safety and protection of the public" and provides the procedure to be followed "whenever any such viaduct shall be deemed and declared by ordinance necessary for the safety and protection of the public." There is an essential difference, which goes to the very heart of this controversy, between a situation where the "convenience" of the public may be served and one in which measures are necessary for the safety and protection of the public. When the city, by virtue of any powers conferred upon it with that end in view, desires to provide for the convenience of the public and creates any expense in doing so, it must provide for that expense under its

general power of taxation, and that power, under the Constitution of Nebraska, must be so exercised that the burden shall be laid equally upon all persons and corporations within the state in proportion to the value of property (Sec. 1, Art. 9, Neb. Constitution of 1875). Of course, the city is not claiming in this case to exercise any other powers except those conferred by the viaduct statute which has been cited. Therefore, in order to justify the passage of an ordinance requiring the railroad company to construct a viaduct, there must first have been passed in good faith an ordinance declaring the construction of the viaduct necessary for the safety and protection of the public. But can the city be heard to say in one and the same breath that this railroad crossing may be left open to the general traffic and at the same time that it is so dangerous that the safety and protection of the public require the construction of a viaduct over it? The city ought not to be permitted to blow hot and cold in this manner any more than an individual might do in similar transactions, and while a municipal corporation in the exercise of the police power may not be bound by its prior agreements or representatives as to the necessity of the case, yet it ought to be bound to act within the letter and the spirit of the very legislation under which alone it derives its power to lay this burden upon the railroad company.

It is true that since this case was heard in the Circuit Court of Appeals, the particular statute involved in this case (Sec. 7595 Cobbey's Statutes for 1907, *supra*) has been considered by the Supreme Court of Nebraska and the power of the City of Omaha under the statute to order the construction of a viaduct by

a railway company without closing the grade crossing has been upheld by the State (*State ex rel. City of Omaha v. Union Pacific Railroad Company et al.*, 143 N. W. Reporter, 918, not yet officially reported). Two facts, however, with respect to that case operate to remove it from cosideration as an authority in the present suit. The first of these is that in its decision the Supreme Court of Nebraska relied strongly upon and quoted at considerable length from the opinion of the Circuit Court of Appeals in *this very case*, and the second is that the point now submitted to this court is not the one passed upon by the Nebraska court. The Nebraska court decided that the statute under consideration authorized the city to compel the construction of the viaduct by the railway company without closing or abolishing the grade crossing. The proposition now submitted to this court is that the action of the city under the statute, construed as it has been by the Supreme Court of Nebraska, deprives this appellant of its property without due process of law, denies to it the equal protection of the laws and undertakes to take its property for a public use without compensation, in that under a pretended exercise of the police power for the safety of the public, it undertakes to require this appellant to expend a vast sum of money for the construction of a viaduct which will require the continued operation of a grade crossing under or along side it, much more dangerous, not only to that portion of the public traveling *across* appellant's track, but also to that portion of the public, both railway employes and passengers, traveling *along* appellant's tracks, without removing or abolishing such grade crossing.

IV.

The Court erred in deciding that Ordinance No. 7072 of the City of Omaha was not void for uncertainty and for impossibility of compliance with its requirements.

The seventh and eighth assignments of error (Rec., p. 193) complain of the holding of the lower court in deciding that the ordinance was not invalid for uncertainty, in that no plans and specifications had been prepared and approved at the time of the passage of the ordinance, and that the ordinance was not void for uncertainty in that the alleged plans and specifications were so indefinite and unintelligible that they could not have been followed.

The statute which we have already quoted provides:

> "The width, height and strength of any such viaducts and approaches thereto, the material therefor and the manner of construction thereof shall be as required by the City Engineer and approved by the Mayor and Council."

For purposes of this argument, it may be assumed that it might be a sufficient compliance with this provision of the statute if the Council by an ordinance, complete within itself and without reference to any other plans or specifications, had ordered the construction of a viaduct, and had sufficiently designated its location and its width, height and strength, the material therefor and the general manner of its construction, so that the railroad company might itself prepare the usual drawings and details and specifications within the limits of the general terms fixed by the ordinance. In that case no attack could be made upon the validity of the enactment upon the ground that the directions

were not specific enough to be complied with. Upon the other hand, it will probably be conceded by the city that if it should provide by general terms for the construction of a viaduct in accordance with plans and specifications said to be prepared by the Engineer and approved by the Council, and it then appeared that, as a matter of fact, no plans whatever had either been prepared or approved, it would be impossible to comply with such an ordinance, and it would be void for uncertainty.

It is the contention of the railroad company that the latter situation, with some complications which need to be explained, is the one that actually exists here.

It will be noticed that this ordinance does not provide in general terms for the construction of a viaduct whose "width, height and strength, the material therefor and the manner of construction thereof" are all specified within the terms of the ordinance itself. The attempt of the City Council is to legislate by reference to plans and specifications assumed to be in existence, so that the designation of the plan of the work as contained in the plans and specifications is by reference incorporated into the ordinance itself. In other words, the railroad company, in order to comply with this ordinance, cannot look alone to the terms of the ordinance. It is of necessity compelled to look elsewhere to determine the law under which it must square its actions in order to avoid the penalties imposed by the statute.

On the 20th of July, 1909, the City of Omaha passed its preliminary ordinance declaring "the necessity of constructing a viaduct" in conformity with the general plans and specifications prepared and submitted by the City Engineer of the City of Omaha under and in

pursuance of the provisions of Resolution No. 344, approved February 1, 1909. Section 2 of the ordinance approves and adopts the general plans and specifications prepared and submitted under that resolution.

The final ordinance ordering the construction of the viaduct was passed on the 4th day of April, 1910, and refers to the previous ordinance of July 20, 1909, and orders and directs the railroad company to erect, construct and complete a viaduct, including the approaches thereto, along Dodge street from a point at or near the each curb line of Forty-sixth street to a point approximately 180 feet east of the Saddle Creek Sewer right-of-way over the various railroad tracks. The ordinance provides:

> "Said viaduct and approaches thereto shall be of the width, height and strength and of the material and manner of construction as required by the City Engineer of the City of Omaha and substantially according to the plans and specifications prepared by him and on file in his office and heretofore approved by the Mayor and City Council of said city."

It is plain, therefore, that this ordinance is one which requires the railroad company to construct a viaduct under plans and specifications which are assumed to be in existence at the time of the passage of the ordinance and approved by the Council.

There is a controversy in the evidence as to whether the city ought to have prepared detail drawings of each portion of the structure such as would enable a contractor to bid upon the work, and after entering into the contract, carry out the construction of the viaduct in accordance with the plans. It was contended by the

city that it was not necessary that these detail working drawings should be prepared prior to the passage of the ordinance, but that it was sufficient if the city had prepared general plans and specifications capable of being followed, and from which the railroad itself could prepare its detail work and drawings prior to the letting of the contract or commencement of the work. We accept that contention of the city and concede that if there were in existence, capable of being identified and followed, sufficiently definite general plans and specifications to enable working details to be prepared and a viaduct constructed in conformity to the ordinance and general plans, no objection could be made to the ordinance upon the score of uncertainty or impossibility. But our contention is that there were no such general plans of the work in existence prior to the passage of either of these ordinances, and that the city, in preparing the enactment of these ordinances, had so blundered and confused its own proceedings that compliance with the terms of the ordinance became impossible. It is true that a viaduct could be built between the points designated in the ordinance, and the railroad company could determine its own general plans and from them work out its detail drawings, provided it could assume the right to ignore certain plans and specifications which were in existence, but which could not have been followed without violating the terms of the ordinance.

The Resolution No. 344 (Rec., p. 171) referred to in the ordinance directs the City Engineer to prepare preliminary plans for a viaduct from Forty-sixth to a point west of Forty-fourth street. This resolution was approved February 1st, 1909. On March 9th the City Engineer transmitted to the City Council a communi-

cation (Rec., p. 171), in which he submits plans of a viaduct. It is admitted that the plan which was at that time submitted by the City Engineer is the one shown by the blue print (Exhibit 1) attached to Rec., p. 105, of the printed record. It is also admitted that the only plan of construction ever approved by the City Council is the one shown by Exhibit 1 (Rec., p. 105).

A reference to the details of this plan, attached in full to the record in this court, shows that it was dated March, 1909, at the time of the communication from the City Engineer to the city; that it provides for a viaduct, the total length of which will be 695 feet, and not the 810 feet required by the ordinance subsequently passed, and that it provides for a grade of 6.5 per cent at the east approach.

But it also appears that after the passage of the ordinance of April 4, 1910, there was in existence a document called an "alternate plan" to accompany the original plan. This alternate plan was dated May 4, 1909, and indicates a length of construction of 810 feet, with a grade of 6.5 per cent at the east approach, and indicates clearly that the structure is carried further east for the purpose of giving a clearance to the proposed boulevard at what is called the Saddle Creek Sewer right-of-way. This plan was delivered to the railroad company with a copy of the ordinance, and also accompanied by a copy of the original plan. It is attached to this record as Exhibit 2 (Rec., p. 105).

In response to the averment contained in the bill that the requirements of the ordinance and the plans and specifications were so indefinite as to make compliance therewith impossible, the Counsel of the City of Omaha was pleased to suggest in the answer of that corporation (Rec., p. 17) "that if it (the railroad com-

pany) cannot intelligently understand what it is required to do, the difficulty is with its understanding and not with the plans." Let us see, from this record, how the superior intelligence possessed by the city officials enabled them to understand what to do under these plans and specifications.

The original plans of March, 1909, were prepared by one Andrew Rosewater, then City Engineer. But it appears that he died in April 1909 (Rec., p. 27), and was succeeded as City Engineer by one Ayerigg, under whose administration the so-called alternate plan of May 4, 1909, was prepared, this being the plan which was never submitted to the City Council and never approved by it. The term of City Engineer Ayerigg expired on May 24, 1909, and he was succeeded by City Engineer Craig, who represented the city in this litigation and testified on its behalf. It appears from his testimony that when this case was pending for hearing in the lower court on the application for a temporary injunction (Rec., pp. 89-90), he was under the impression that this so-called alternate plan was complete in itself and that it, together with certain revised specifications, which he thought had been adopted, but which in fact never were (Rec., pp. 89-90), sufficiently indicated the manner of constructing the viaduct. And at the time of the commencement of the taking of the testimony for the final hearing in this case (Rec., p. 26), this witness was still of the opinion that the so-called alternate plans, Exhibit 2, were the plans under which the viaduct was to be constructed. It must be remembered that, although this witness did not prepare the plans, yet he was the official, subject to whose approval, both by statute and ordinance, it was incum-

bent upon the railroad company to construct the viaduct under the penalties imposed by the statute.

And yet, at the time when the penalty of $100 per day would begin to accrue against the railroad company for failing to begin the actual erection of the viaduct, and during the several months which elapsed from that time until the taking of the testimony in this case, on September 8th, 1910 (Rec., p. 25), at a time when the construction of the viaduct ought to have been considerably on the way, in order to be completed within the time fixed in the ordinance, this witness did not know which of the two alleged plans would have to be followed; and yet they could not both be followed, for one provides for a viaduct 695 feet long, which does not clear the proposed boulevard through the Saddle Creek Sewer right-of-way, and the other provides for a viaduct 810 feet long, giving clearance over the proposed boulevard. The first plan was the only one ever submitted to the Council and approved by it, and yet it is conceded that the ordinance requires the construction of a viaduct of the length indicated by the other plan. Towards the close of the taking of the testimony, and after the difficulties had been sufficiently discussed, the witness then conceded that in order to build the viaduct, it is necessary that both the plans be considered together, the latter one modifying the first, and inferentially, that a viaduct could not be constructed by means of either one alone (Rec., pp. 78-79).

A similar difficulty exists with reference to the specifications. There is in evidence Exhibit 3 (Rec., p. 106), Exhibit 4 (Rec., p. 124) and Exhibit 5 (Rec., p. 143), each of them being so-called specifications. Exhibit 3 is the original specifications of 1908, adapted for use

elsewhere, and never intended to be used in the construction of this viaduct. See Rec., p. 29, where the city's witness, referring to this exhibit, states, "Well, that copy there didn't apply to the Dodge street viaduct." And when the offer was made by the railroad company, the city objected for the reason that the specifications included in Exhibit 3 had no application to the construction of the proposed viaduct (Rec., p. 31).

Exhibit 5 consists of revised specifications, revisions having been made in lead pencil in Exhibit 3, prior to April 4, 1910, and never written out and submitted to the City Council for approval, and therefore having no official existence at all. It is apparent from Mr. Craig's testimony that at the time of the hearing of the application for a temporary injunction he was preparing to compel the railroad company to construct the viaduct in accordance with these informal, unapproved revised specifications, Exhibit 5.

Exhibit 4 consists of the specifications as approved by the City Council July 13, 1910 (Rec., pp. 31-32), subsequent to the passage of the ordinance and subsequent to the time when the railroad company was required to begin the construction of the viaduct.

Yet in this case the City of Omaha, by the decree of the lower court, is left free to inflict a penalty of $100 per day upon the railroad company for failing to comply with an ordinance which, by its express terms, requires the railroad company to follow plans and specifications which were either non-existent or unintelligible, and of so confused a character that its own City Engineer was unable to interpret them as to their most fundamental phases until after this litigation was well under way.

The sixth assignment (Rec., p. 193) complains of the

error of the Court in holding that the ordinance was not invalid because it required the complainant to commence the construction of the viaduct within twenty-six days after the passage of the ordinance.

It appears to have been the theory of the lower court that the railroad company could have complied with the ordinance by going upon the street in question before the time fixed for the commencement and making some formal commencement of the erection, and thereafter, within the period limited by the ordinance for the completion of the viaduct, it might by the utmost precipitancy complete the structure within the time limited.

A portion of Section 7594 already quoted is as follows:

> "It shall be the duty of any railroad company or companies upon being required as herein provided to erect, construct, reconstruct or repair any viaduct, to proceed within the time and in the manner required by the Mayor and Council to erect, construct, reconstruct or repair the same, and it shall be a misdemeanor for any railroad company or companies to fail, neglect or refuse to perform such duty, and upon conviction of any such company or companies shall be fined one hundred dollars, and each day such company or companies shall fail, neglect or refuse to perform such duty shall be deemed and held to be a separate and distinct offense."

The final ordinance (Rec., p. 7), in its second section, enacts as follows:

> "That The Missouri Pacific Railway Company be and they are hereby ordered, directed and required to commence the erection and construction

of said viaduct, and the approaches thereto, not later than May 1st, 1910, and to fully complete the same on or before January 1st, 1911."

Can there be any doubt that under this statute and this ordinance, if they are both to be sustained, the failure of the railroad company to commence the "erection and construction" prior to May 1st, 1910, would make it subject to the penalties?

It is conceded by the city that before any contract could be let, or any work planned or material ordered by the railroad company, it would be necessary to provide working drawings and detailed plans which would permit of the construction of the necessary metal work, the ordering of the material and the providing of the labor to build this structure. It is shown, and not denied, that the preparation of these detailed plans would require the work of a competent architect and his assistants for a period of between thirty and sixty days.

This crossing had existed for a period of over twenty years, the railroad company was operating its trains, and the street railway company for whose benefit it is apparent that the viaduct was ordered had been carrying its passengers over this crossing. It is neither alleged nor shown anywhere in this case that the traffic had recently increased or that conditions had materially changed in the period immediately preceding the ordering of this viaduct. The city itself had proceeded with the utmost deliberation. On the first of February, 1909, it directed its City Engineer to prepare preliminary plans for the construction of the viaduct (Rec., p. 171). On March 9, 1909, the City Engineer transmitted to the City Council his proposed plan, with an explanatory letter (Rec., pp. 105-171). On the 20th

of July, 1909, the city passed the preliminary ordinance declaring the necessity of the viaduct and providing for ascertaining the damages caused by its construction (Rec., pp. 4 and 5). This ordinance was vetoed on July 26, 1909, but was passed by the Council over the Mayor's veto on the 28th of July, 1909. The determination of the amount of damages, or, as the record in this case shows, the revising of means to escape the payment of the damages required by law to be met by the city, appears to have required the period of a year, so that on the 4th of April, 1910, the Council passed and the Mayor approved the final ordinance directing the construction (Rec., p. 7). Section 3 of this ordinance provides that certified copies of the ordinance, with plans and specifications, shall be delivered to the railroad company without unnecessary delay. It appears in the evidence that no attempt was made by the city officials to comply with this portion of the ordinance, but that, being advised of the city's action, representatives of the engineering department of the railroad company presented themselves at the city's offices in Omaha on the 22d day of April, 1910 (Rec., p. 35) and were given plans and specifications which it now appears had never been adopted by the City Council and could not have been followed in the construction of the viaduct.

Yet, notwithstanding the long continued existence of the situation which it is now claimed requires the construction of a viaduct, and notwithstanding that the city itself consumed more than a year and two months in reaching its conclusion, it endeavors to put into effect, under a statute which is highly penal, an ordinance requiring the railroad company to perform a physical impossibility. It will be noted that the lan-

guage of the ordinance is that the railroad company shall commence "the erection and construction" of the viaduct not later than May 1, 1910. And the statute provides that it shall be a misdemeanor for the railroad company to fail to commence the erection and construction "within the time" required by the city. The act of architects in drafting detailed plans could under no circumstances be construed to be the commencement of the work of erecting and constructing a viaduct.

However, the lower court disposes of this proposition by the holding that if the railroad had commenced the work in good faith, a court of equity would have relieved against undue exactions. The purpose of this present proceeding, which the lower court dismissed, was to invoke the aid of a court of equity to prevent the laying of undue exactions.

V.

The Court erred in affirming the decree of the Circuit Court dismissing appellant's bill and in holding that appellant's bill was without equity.

It is to be noted that in this case the jurisdiction of the Circuit Court was invoked, both upon the ground that the controversy arises under the Constitution and laws of the United States and also by reason of the diverse citizenship of the parties, so that every remedy which the state courts of Nebraska ought to have granted, and would have given this complainant in a suit properly instituted in those courts, should now be available in this proceeding.

It is the settled rule in Nebraska, as well as in all jurisdictions in which salutary limitations are imposed by fundamental law, upon invasions by the law-mak-

ink power of the rights and liberties of the citizen, that an ordinance, although passed pursuant to a valid statute, so unreasonable in its terms as to convince the court that it is neither designed nor effective to serve the legitimate purpose for which the authority was vested in the municipal body, will be denounced and set aside by the courts as invalid.

In this case we have shown:

1. The principal purpose in ordering this viaduct and the greater portion of the expense to be incurred in constructing it arises out of the traffic of the street railway company, so that the railway company will be compelled to expend its money for the construction of a tramway for the local company.

2. The ordinance requires the railroad company to so unreasonably extend the east approach of the viaduct as to carry the traffic of the street railway company over a proposed boulevard.

3. The ordinance declares that the crossing is so dangerous as to make necessary the construction of the viaduct, and at the same time proposes to leave this dangerous crossing open to the public traffic.

4. The ordinance requires the railroad company to construct according to plans and specifications in respect to which the city's proceedings were so blundering as to make compliance with the ordinance impossible.

5. The ordinance requires the railroad company to commence to erect and construct the viaduct within twenty-six days after the date of the ordinance, or within eight days after the railroad company had knowledge of the alleged plans which it was required to follow, when it would have been impossible, if the

plans had been intelligible, to have commenced the erection and construction within sixty days from that date.

An ordinance so full of favoritism, so regardless of the constitutional rights of the railroad company, so indicative of a desire on the part of the city to exact expenditure from the railroad company for the purpose of embellishing its own system of parks and boulevards, and so reckless as to the time and manner of its requirements, is an extreme case of the kind of municipal legislation which should be set aside as unreasonable.

It is a definitely established rule of law that when the Legislature confers upon the government of a municipality the general power of passing ordinances for the safety and protection of the inhabitants, municipal legislation passed pursuant to such general grant of power will be held void by the courts, unless found to be a reasonable exercise of such power.

Iler v. Ross, 64 Neb. 710;
State v. Jersey City, 47 N. J. L. 286;
Toledo, Wabash & Western Ry. Co. v. Jacksonville, 67 Ill. 37;
Wice v. Ry. Co., 193 Ill. 351;
Curran Bill Posting Co. v. Denver, 47 Colo. 221;
Landberg v. Chicago, 237 Ill. 112;
Chicago v. Gunning System, 214 Ill. 628;
Champer v. Greencastle, 138 Ind. 339.

It is the contention of the city, as indicated in its answer, and as disclosed by its argument in the lower court, that inasmuch as the Legislature has by express statute conferred upon the City of Omaha power to order the railroad companies to construct viaducts over railroad crossings, the reasonableness of an ordinance

passed under such power can not be inquired into by the courts.

It is true that where the Legislature authorized the city to enact ordinances in the exercise of the police power, and there is no judgment or discretion required on the part of the city in carrying the permission into effect, except in so far as it decides to enact or not to enact the ordinance, then the question of reasonableness in the regulation can only be inquired into in so far as it goes to the constitutionality of the statute itself. For illustration, if the statute authorized the Council to forbid by ordinance peddlers and hucksters upon the streets of the city, an ordinance of the city forbidding in general terms such traffic will be sustained unless there is ground for holding the legislation itself invalid.

In re Anderson, 69 Neb. 686.

But it is equally well settled that when the power to legislate on a given subject is conferred by statute, but the details of the legislation and the manner of adapting the provisions of the ordinance to the requirements of each particular case, is not prescribed by statute, then the ordinance may be held invalid, if it is found by the courts to be an unreasonable exercise of the power.

I. Dillon Mun. Cor. (4th Ed.), Sec. 328;
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Union Pacific R. Co. v. State, 88 Neb. 247;
Shelbyville v. R. R. Co., 146 Ind. 66;
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Ford v. Standard Oil Co., 32 N. Y App. 596;
Chicago v. Water Co., 214 Ill. 212;
City of Belleville v. St. Clair Co. Turnpike Co., 234 Ill. 428.

The Nebraska cases above cited, although sustaining in each case the ordinances in question, yet contained strong expositions of the principle of law which we are here contending for, since in each case the Court sustained the ordinance, not because it would refuse to inquire into the reasonableness of municipal legislation passed under express statutory power, but because, after a careful examination of the nature of the ordinance and its relation to the subject matter, the Court concluded that it was a reasonable exercise of the power and could for that reason, and that reason alone, be sustained.

In *Union Pacific v. State*, 88 Neb. 247, cited above, the Legislature expressly delegated to the city the power to regulate the location of stock yards, and under that statute the city passed an ordinance forbidding the maintenance of stock yards within certain prescribed limits within the city. In reviewing a prosecution in which the validity of the ordinance was drawn into question, the Supreme Court of Nebraska considered fully whether the ordinance was reasonably designed to carry out the purpose for which it was authorized and laid down the rules to determine the reasonableness of such ordinances.

In all of the other cases cited under this point, the Court holds the municipal legislation invalid, when found to be unreasonable, although passed pursuant to express legislative authority.

In *Hawes v. Chicago*, 158 Ill. 653, cited above, the Court said:

> "An ordinance must be reasonable, and if it is unreasonable, unjust and oppressive, the courts will hold it invalid and void. The question of the reasonableness or unreasonableness of a municipal ordinance is one for the decision of the court, and in determining that question the Court will have regard to all the existing circumstances or contemporaneous conditions, the objects sought to be obtained and the necessity or want of necessity for its adoption."
>
> "And even where the power to legislate on a given subject is conferred on a municipal corporation, yet, if the details of such legislation are not prescribed by the Legislature, there the ordinance passed in pursuance of such power must be a reasonable exercise thereof, or it will be pronounced invalid."

Finally, it is respectfully submitted that for one further reason both courts below erred in dismissing appellant's bill in full for lack of equity. The Nebraska statute in question (Sec. 7595 Cobbey's Statutes for 1907, *supra*) not only makes no provision for a judicial hearing with respect to any matters covered by a city ordinance undertaking to require a railroad company to erect a viaduct across its tracks, but undertakes to make it the duty of any railroad company or companies upon being required by ordinance to erect, construct, reconstruct or repair any such viaduct "to proceed within the time and in the manner required by the Mayor and Council to erect, construct, reconstruct or repair the same," and further provides that "it shall be a misdemeanor for any railroad company or compa-

nies to fail, neglect or refuse to perform such duty, and upon conviction of any such company or companies shall be fined one hundred dollars, and each day such company or companes shall fail, neglect or refuse to perform such duty shall be deemed and held to be a separate and distinct offense * * *" It thus appears that on April 4th, 1910, the date of the approval of the ordinance, No. 7072, of the City of Omaha, this appellant was confronted with an ordinance undertaking to require it to perform that which, on the testimony of the city's own engineer given in this case, was a physical impossibility, and with a statute rendering it liable to a penalty of $100.00 a day for its failure to perform the impossible. It is true that the Court of Appeals, in its opinion, states that "the ordinance does not mean a beginning of the physical structure" (Rec., p. 189), but the foundation for such an interpretation of the plain language of the ordinance itself is, we respectfully submit, hard to find. Section 2 of the ordinance in question (Rec., p. 7) expressly undertakes to direct and require appellant "*to commence the erection and construction of said viaduct and the approaches thereto not later than May 1st*, 1910" It is respectfully submitted that this language is plain, unequivocable, unambiguous and sueptible of but one reasonable interpretation, which is that it was the purpose and intent of the City Council in passing said ordinance to require appellant to begin, not the preparation of plans and specifications for a viaduct, which, according to the ordinance itself, *had been already prepared*, but the *actual, physical work* of "erection and construction of said viaduct and the approaches thereto." The ordinance was approved on April 4th, 1910, and the time limited therein for the beginning of the

work of erection and construction of the viaduct was May 1st, 1910, or *twenty-six days* from and after the approval of the ordinance, while according to the testimony of Mr. Geo. W. Craig, City Engineer of the City of Omaha (Rec., pp. 81-82), it would take a competent engineer not less than thirty days after the receipt of the partial and incomplete plans referred to in the ordinance to prepare detailed plans, if he had at hand all necessary information in regard to local conditions, and according to the testimony of the same witness, it would take at least two weeks after receipt of such detailed plan by a contractor to enable him to prepare a bid upon the work.

This court has repeatedly pronounced its disapproval of state legislation which attempted, through the medium of the imposition of heavy penalties, to prevent parties affected thereby from resorting to the courts for a determination of their legal rights. In *Cotting v. Kansas City Stock Yards Co.*, 183 U. S. 79, the late Justice Brewer, at page 100, asked this very pertinent question: "Do the laws secure to an individual an equal protection when he is allowed to come into court and make his claim or defense subject to the condition that upon a failure to make good that claim or defense the penalty for such failure either appropriates all his property or subjects him to extravagant and unreasonable loss?" And at page 102 of the same volume he says: "It is doubtless true that the state may impose penalties, such as will tend to compel obedience to its mandates by all, individuals or corporations, and if extreme and cumulative penalties are imposed only after there has been a final determination of the validity of the statute, the question would be very different from that here presented. But when the legislature, in an

effort to prevent any inquiry of the validity of a particular statute, so burdens any challenge thereof in the courts that the party affected is necessarily contrained to submit rather than take the chances of the penalties imposed, then it becomes a serious question whether the party is not deprived of the equal protection of the laws."

It is true, as was stated by Mr. Justice Peckham in *Ex parte Young*, 208 U. S. 123, at page 146, that the Cotting case was not decided on that particular point. On page 147 of the volume last cited, however, Justice Peckham says:

> "If the law be such as to make the decision of the legislature or of a commission conclusive as to the sufficiency of the rates, this court has held such a law to be unconstitutional (*Chicago, Etc., Railway Co. v. Minnesota*, 134 U. S. 418.) A law which indirectly accomplishes a like result by imposing such conditions upon the right to appeal for judicial relief as works an abandonment of the right rather than face the conditions upon which it is offered or may be obtained, is also unconstitutional. It may therefore be said that when the penalties for disobedience are by fines so enormous and imprisonment so severe as to intimidate the company and its officers from resorting to the courts to test the validity of the legislation, the result is the same as if the law in terms prohibited the company from seeking judicial construction of laws which deeply affect its rights."

In the present instance, we find a statute under which, on its face, the City of Omaha is authorized, as appellant's bill (Rec., p. 12) states, that at the institution of this suit it was threatening to do, to collect penal-

ties from appellant at the rate of $100.00 per day by reason of appellant's failure, not only to perform the impossible in beginning the actual work of the erection and construction of a viaduct within twenty-six days after the approval of the ordinance calling for such construction, but also by reason of appellant's temerity in venturing to question the power or authority of the city to compel appellant to spend in the neighborhood of $50,000.00 for the construction of a viaduct for the benefit of the street railway company, and securing a judicial determination of its rights and liabilities in that respect, and this, in spite of the fact that all of the adjudicated cases upon similar points reported in this country at the time of the institution of this suit denied the power of a municipality to compel a railroad company to devote its revenues to the building or strengthening of viaducts for the use of street railway corporations. It is, therefore, respectfully submitted that, even conceding, for the purpose of this particular argument, that the court below was right in its other rulings, it erred grievously in dismissing appellant's bill for want of equity and in not sustaining it at least to the extent of enjoining the City of Omaha from undertaking or attempting to proceed against appellant for the collection of penalties by reason of its failure to begin the erection and construction of the viaduct contemplated by Ordinance No. 7072 of said City of Omaha, either by reason of the impossibility of beginning such erection and construction by May 1st, 1910, or by reason of its failure to begin such work pending the determination in the courts of the questions now submitted to this court in this cause.

CONCLUSION.

In conclusion, we beg to most respectfully and urgently invite the most careful consideration and attention of the Court to the dissenting opinion filed in this case in the Circuit Court of Appeals (Rec., pp. 189-190). We invite attention to the fact that in overruling all of the contentions of appellant the controlling opinion in the Circuit Court of Appeals *does not cite a single authority* in support of the decision of that court on any one of the material points at issue in this controversy, while the dissenting opinion not only cites what are the majority if not all the adjudicated cases on points similar to the two chief points at issue in this cause, but is in harmony with the results reached by all American courts on similar questions whose opinions are to be found in the printed reports.

It is respectfully submitted that in the light of the entire record in this cause, and of the foregoing argument and the authorities therein cited, the decree of the United States Circuit Court of Appeals for the Eighth Circuit in this cause should be reversed and the cause remanded to that court with proper directions to enter a decree therein in favor of this appellant.

Respectfully submitted,

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Of Counsel.

Supreme Court, U. S.
FILED
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JAMES D. MAHER
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Supreme Court of the United States

OCTOBER TERM, 1913.

No. [redacted] 47

THE MISSOURI PACIFIC RAILWAY COMPANY,
APPELLANT,

vs.

THE CITY OF OMAHA,
APPELLEE.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF FOR APPELLEE.

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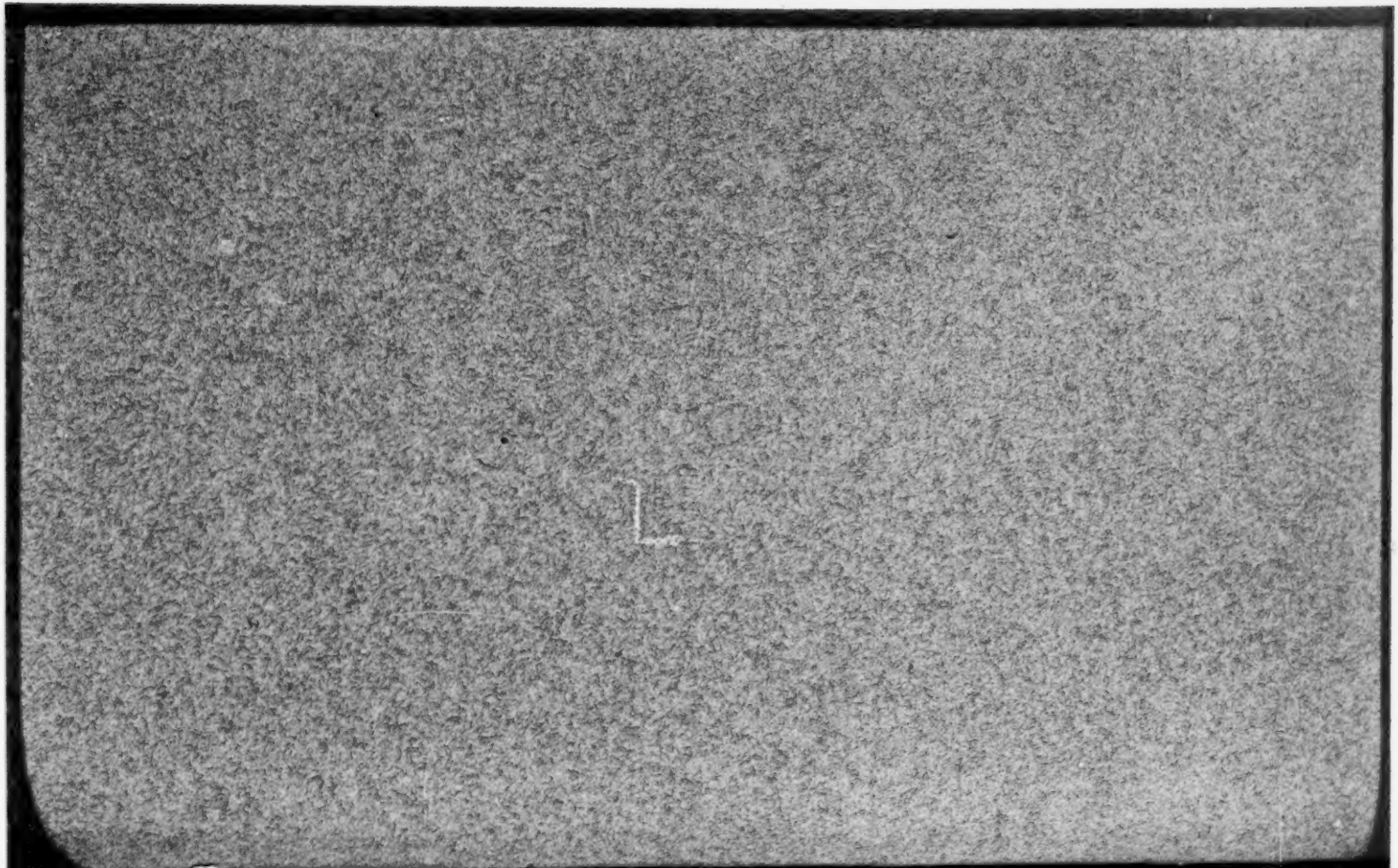

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(a) The Legislature of the State of Nebraska possesses ample and plenary power to require railroad companies in this state, intersecting public streets and highways with their roads, and at the cost of such company or any one of them, to bridge or viaduct or otherwise render and keep safe, that part of the public street or road intersected and made dangerous by their roads, as to all ordinary travel on and over such public streets, including that of street railways rightfully thereon .. 4

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1. 46

(b) Even if the requirements of the city as to the added length to the end of said viaduct were to protect a proposed boulevard, constructed sewer lines and sewer pipes crossing Dodge Street under such boulevard or its abutments, we think the city had the authority rightfully to require it.

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OCTOBER TERM, 1913.

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THE MISSOURI PACIFIC RAILWAY COMPANY,
APPELLANT.

vs.

THE CITY OF OMAHA,
APPELLEE.

BRIEF AND ARGUMENT.

I.

PRELIMINARY REMARKS.

In that part of appellant's brief denominated "Introduction," on page 13 thereof, appellant expressly abandons the contention in its bill that the City of Omaha was without power to require it to construct a viaduct, at the point complained of, sufficient, at least, to carry "ordinary" street traffic. It finally yields to the statutory law in that regard, and the decisions of the Supreme Court of the State of Nebraska and of this court as to the constitutionality of the statute delegating power to the City to require the construction of viaducts by the intersecting railroads

when the necessity therefor is properly declared by the municipal authorities; and well might it so yield when confronted by the following array of authorities upholding this and similar legislation:

C. B. & Q. Ry. Co. vs. Nebraska, 47 Nebr. 549;
C. B. & Q. Ry. Co. vs. Nebraska, (on appeal), 170 U. S. 57;
N. Y. & N. E. Ry. Co. vs. Town of Bristol, 151 U. S. 556;
State, ex rel City of Minneapolis vs. St. Paul, M. & M. Ry. Co., 98 Minn. 380;
C. B. & Q. Ry. Co. vs. Chicago, 166 U. S. 226;
Cincinnati I. & W. Ry. Co. vs. Connersville, 218 U. S. 336;
Phoenix Mutual Life Ins. Co. vs. Lincoln, 91 Nebr. 150;
State ex rel Omaha vs. U. P. R. R. Co. (Nebr.) 143 N. W. 918;

To these cases, or to some of them, reference may be made in a subsequent part of this brief, respecting the extent of exercise of the police power.

The concession so made of the existence of the power, carries with it the further concession of the right to its exercise, confessedly, to a certain extent, at least. So, there no longer remains any question or contention as to the existence of the power or any contention as to the right of the city authorities to exercise it in this instance, so far as requiring the appellant to construct a viaduct at the point in question amply sufficient to take care of what it terms "the ordinary and usual" street traffic, (assuming the proper observance of the precedent requirements to its proper exercise),

the contention focuses about the city's requirement that appellant construct a viaduct of sufficient strength, width, capacity and grades to carry over the point of danger all traffic including that of the street railway operating its line over that part of Dodge Street in said city. It is said that the requirement respecting the carrying of the street car traffic is an arbitrary assumption of power on the part of the city not given by any statute of the state, and indeed, the attempted exercise of authority beyond the power of gift by the legislature; and which deprives appellant of its property without due process of law and without just compensation, and denies to it the equal protection of the law.

There are, therefore, presented for consideration and determination the questions, whether or not in the proper exercise of its legislative and police power, the Legislature of the State of Nebraska might require appellant to construct a viaduct at its own expense of sufficient strength, width, capacity and grades to carry all traffic including that of street cars over that part of the public streets which its intersecting lines render dangerous? and whether or not the Legislature has delegated to the authorities of the City of Omaha these requiring powers? No point is made that if the Legislature does possess such power it might not delegate it to the municipal authorities to be exercised, and indeed, none well could be. We are mindful that the discussion of these questions might over-lap and re-

quire more or less of repetition in argument and citation.

(a) The Legislature of the State of Nebraska possesses ample and plenary power to require railroad companies in this state, intersecting public streets and highways with their roads, and at the cost of such company or any one of them, to bridge or viaduct or otherwise render and keep safe, that part of the public street or road intersected and made dangerous by their roads, as to all ordinary travel on and over such public streets including that of street railways rightfully thereon.

1. It may be contended by appellant that the above is not directly presented by any claim which it makes in this case. We think otherwise. On page 17 of its brief, this statement appears: "the question, therefore, is not of the existence of a power, but only of its abuse." The term "abuse" as here used is evidently equivalent to a claim of want of power in the city, both because not conferred by statute; and could not be conferred because of want of power in the Legislature itself. This conclusion seems necessarily to result from the statements and lines of argument pursued in the brief, and especially that part thereof on pages 20 and 21. The theory and complaint of appellant being that the requirement complained of violates its rights under the Constitution of the United States respecting just compensation, due process of law and equal protection of the law. If well taken, the complaint would be equally effectual whether the exercise of the power was by the city in the second instance, or the Legislature of the State in the first.

The question goes fundamentally to the want of power at the source.

This challenge is one that strikes at the powers of the State to care for the welfare and safety of its inhabitants. If the State is denied the exercise of this power, it must be for all persuasive reasons. Ordinarily the State's powers as well as its duties in this behalf are both great and insistent. To this time, in the history of this country, the legislative power of the state or nation, whatever might be its appropriate designation, has been found continually and increasingly sufficient to require uncompensated obedience by the railway companies of the country in adjusting their tracks, their roadbeds, their cars and their operating equipment to the safety and protection of travel on the highways of the country, state and municipalities. Adequate guards, signals and safety devices have been uniformly required, bells and whistles have been required on the engines and their use compelled, and bridges, viaducts and subways have been required to be constructed and maintained, by legislative mandate, and all at the expense of the intersecting railroad companies. This court has been first to lend its outside sanction and authority to the full enforcement of such power.

The exercise on behalf of the State of this power and its exercise by the various political subdivisions of the State to which such power might have been delegated, was strenuously resisted at one time by the railroad companies, advancing the claim at that time

as now and here, that such power did not exist, that its exercise was arbitrary and unreasonable and resulting in the confiscation of the property of the railroad companies in direct violation of their constitutional rights, as invoked in this proceeding.

The courts have uniformly denied this contention, resting the denial on the larger ground that the property of the individual was at all times subject to the over-ruling necessity of the public welfare and safety, and largely on the lesser grounds that the railway companies took their rights to operate roads throughout the country, burdened with the duty to hold and to operate their properties and rights in such manner and under such circumstances as not to interfere unreasonably with the rights of the public. That the railroad companies in constructing their lines across a public highway or street and in operating their cars and trains thereover acquired an easement only in such highways and streets, which right and easement on its part were subject to the superior right and easement on the part of the public in such street and highway to have the intersecting part safe and continued safe for all the traffic and travel rightfully on the street or highway.

There may be, and doubtless are, limitations upon the power and authority of the Legislature to require uncompensated acts and sacrifices by the railroad companies, but we are convinced that these limitations will be found and established somewhere beyond the duties of the State to protect the traffic and travel

rightfully on its public streets or highways as against dangers introduced by their intersection with the right-of-way and roadbeds of railway companies and the operation of their cars and trains thereover.

The power to make and enforce these requirements is said to be the exercise of the reserved or police power of the state. This court has said that government owes its citizens the duty of providing and preserving safe and convenient highways. That from this duty results the right of public control over such highways.

In *C. B. & Q. Ry. Co. vs. Chicago,* 166 U. S. 226; it is further said that railway companies intersecting the public streets with their right-of-way and tracks are subject to the police power of the state and defines that power to be one co-extensive with self-protection and not inaptly termed "the law of over-ruling necessity."

There is no dispute in this record but that the Omaha & Council Bluffs Street Railway Company was operating a double track street railway system on and over that part of Dodge Street intersected by the right-of-way and tracks of appellant company, at the time of the requirement of the viaduct in question. Nor is there any dispute but what it had been operating its tracks over this point for years prior to that time. Its operation was under a franchise from the State and consent from the City of Omaha. It served a populous community and operating several hundred cars each day in this service over the point in question.

It was rightfully upon Dodge Street at that point and entitled to operate its system on and over that part of said Street. Its traffic and travel, or the traffic and travel using its cars and equipment constituted, it is true, a large part of the public traffic over that part of Dodge Street, but by no means all the traffic thereover. The record shows that Dodge Street was not only a public street of the city but one of the main public thoroughfares of the state, leading westward from the City of Omaha through a populous section of the State for more than two hundred miles, and one of the few paved and well kept thoroughfares from the city into the country. (R. p. 80).

The duty of the State to require its public ways to be kept and maintained in a safe condition is a duty owing to all rightful travel thereover. It is difficult to conceive how this duty might be owing to a traveler in a wagon, on foot or in automobile and not owing to a passenger in a street car of a system rightfully on the streets. The purpose of the power and the justification for its exercise is the protection of the traveling public. The means adopted for travel, if rightful, would in reason seem immaterial; and it seems well-nigh preposterous to assert or claim that the State would not have the power or owe the duty to the public traveling in street cars, to see to it that its public highways were kept reasonably safe, for such travel.

It is conceded that the State might require of intersecting railroad companies the uncompensated duty of maintaining their crossings with public streets rea-

sonably safe for the public travel thereover on foot, by team, automobile and like means of conveyance. The performance of this requirement of the State on the part of the railroads frequently require large expenditures on their part, but it is definitely and fully established by the decisions of this court and those of the various states that such requirements do not violate the constitutional rights of such companies. Now, in what essential respect does this duty differ from that which might require such companies to maintain their crossings safe in respect to street car traffic rightfully on the streets? Street cars are one of the common, most essential, and even indispensable methods and means of public travel over the streets of large cities and in populous communities. There is nothing in the nature of the traffic distinguishing it essentially from other means of traffic. The duty on the part of the State to protect passengers adopting this means of travel is just as exacting and continuing as is the conceded duty as to the traffic termed "ordinary traffic." It may be contended that the equipment is heavier and would require a greater outlay on the part of the railway company to protect it against or carry it over the point of danger. But does this distinguish in any sense or remit or abate the duty which the State owes it as respects safety? This same argument could be made as between large cities and small cities or the country, as to team and transfer traffic, because it is unquestioned that larger and heavier conveyances are used in the larger places than in the smaller, and it

could also be made respecting the different periods of time when the requirements are exacted because it is well known that new and improved methods of conveyance for what is termed the "ordinary traffic" on the streets are constantly coming into vogue and use. Nor do we believe the company will be heard to say that the street car traveler is protected by his contract of safe carriage with the company. This does not abate one whit the duty of the State to keep or to require its highways to be kept in a reasonably safe condition. If this were true, it would be enough to defend against the exercise of this power where ever the traveler carried accident insurance. None of these contentions will do. The only thinkable remaining contention is, that the railway company, on account of the heavy equipment of the street car companies will be to a greater burden and will be required to expend more of their money. We cannot think that this contention will be found to furnish a satisfactory basis for a distinction denying the right of the existence of such power or the right of its exercise. *C. B. & Q. Ry. Co. vs. Illinois,* 200 U. S. 561; 50 L. ed. 596.

The constitutionality of the requiring statute here involved as respects the larger powers of the Legislature of this State in the exercise of the reserve or police power thereof, came before the Supreme Court of Nebraska in a case entitled *C. B. & Q. Ry. Co. vs. Nebraska,* 47 Nebr. 549; being thereafter affirmed by this court in 170 U. S. 57. The Supreme Court of Nebraska said that the essential quality of the police

power as a governmental agency is that it imposes upon persons and property, burdens designed to promote the safety and welfare of the general public. That it is a reserved power and cannot be surrendered or bartered away. That it is a power applicable to conditions existing at the time of the requirement of its exercise without regard to the time of acquirement or the sources of derivation of the things upon which it operates. That its proper exercise, though oftimes burdensome, does not constitute the taking of property without just compensation or without due process of law, as those terms are understood and used in the Constitution of the United States.

In this case it was held that though the viaducts span many tracks of different companies, each and all causing or contributing to the dangers in the use of the public highway, yet, it was within the power of the Legislature of the State to require any one or more of the authors of the nuisance to abate it at his expense.

In *Health Department vs. Rector of Trinity Church,* 145 N. Y. 32; speaking with reference to the existence of the police power of the State and the right to its exercise, it is said in this case that such power is inherent in the sovereignty of the State; that the justification for its exercise is found in the duty which the State owes to protect the public in life and limb; that such laws and regulations, though they may disturb the enjoyment of individual rights, are not unconstitutional although

no compensation is made directly for such disturbances of rights. The theory of the law being that compensation rests therefor, in sharing the larger benefits which their exercise is intended to procure.

In *State ex rel City of Minneapolis vs. St. Paul, M. & M. Ry. Co.*, 98 Minn. 380; affirmed in this court and reported in 214 U. S. 498; it is held that the state may in the exercise of its police power impose upon railroad companies, intersecting public highways, the duty of providing at their expense the necessary devices to secure the public safety even though the highway has been extended across the railway company's tracks after the construction thereof.

So in *C. B. & Q. Ry. Co. vs. City of Chicago*, 166 U. S. 226, 17 Sup. Ct. 581, it is said that railroads are public highways and that in their relation to the public are subject to legislative supervision; that its property is taken subject to the right of the public to extend its highways and streets thereacross. That the legislative power thereover is a police regulation; that uncompensated obedience to a regulation for public safety under the exercise of such power on the part of the state is not a taking or damaging of property of the company without just compensation. That all the expenses incident to making the intersecting points of its road with the public ways safe, in obedience to legislative requirement, must be deemed to have been taken into account by the company when it accepted the privileges and grants of

franchise from the State and are regarded as incidental to the exercise of the police power of the State.

On this and similar points numberless cases might be cited. We shall content ourselves with citing a few additional cases, believing them, with the cases already cited, as leading cases and abundantly sufficient.

N. P. Ry. Co. vs. State ex rel Duluth, 208 U. S. 583;

Cincinnati I. & W. Ry. Co. vs. Connersville, 218 U. S. 336;

Phoenix Mutual Life Ins. Co. vs. Lincoln, 91 Nebr. 150;

State ex rel City of Omaha vs. U. P. R. R. Co., et al, 143 N. W. 918.

As is said in *C. B. & Q. Ry. Co. vs. City of Chicago, supra;* "Government owes to its citizens the duty of providing and preserving safe and convenient highways. From this duty results the right of public control over public highways." We heretofore quoted this statement and here again repeat it for emphasis. It so appropriately furnishes the standards and tests to measure the rights and duties of the parties to this controversy. If the state owes its citizens the duty of providing safe and convenient highways and if this duty supplies it with the necessary power of performance, then it owes that duty to that part of the public using the conveyances of the street car company rightfully upon the streets and it possesses the power to perform that duty itself or to require the performance of that duty by the intersecting railroad companies which have rendered the public highways unsafe, with-

out directly compensating them for the outlays and expenditures made in that behalf. The duty so owed by the state is not to the street railway company, but to that part of the public which may be its passengers. The duty which was sought to be performed in the requirement that appellant construct a viaduct over its tracks on odge Street was not one owing to the street railway company, but one owing to the citizens who use its cars as a means of conveyance over said street. The appellant most strenuously insist that the added outlay necessary to render safe the street car passengers, is an outlay for the benefit of the street railway company. If this conclusion were correct, the argument would have force; but as a matter of fact and as a matter of law, the purposes of the requirement was not for the benefit of the street railway company, but in the interest of the safety of such part of the public as use its conveyances as a means of travel. Indeed, it is doubtful if it might be truthfully said that a viaduct at that point materially benefits the street railway company. It adds a grade not there now. That the company is put to no expense in using the street as it exists; it could continue to use the street in its present condition probably as profitable as it could a viaduct at that point. True, but merely incidental, it may be more convenient for it to have a viaduct at that point; but no fair analysis of the situation will authorize or justify the contention that the requirement complained of takes from the steam railway its property and devotes it to the uses, purposes and benefit

of the street railway. Whatever is required, is required for the protection and safety of the public traveling over that street and using as a means of conveyance the equipment of the street railway.

2. Apropos, the existence of this power in the Legislature and the duty on its part to exercise it either directly or by means of the city council, as respects the safety of that part of the public using the conveyances of the street railway company rightfully on the streets as a means of conveyance, we think all the reasons and practically all the adjudications, where such question has been presented, abundantly support the claim that street railway passenger traffic is but a part of the common ordinary travel and traffic on the public streets, and especially that of the more populous cities. In the light of developments and in the light of the needs of the more populous communities, it is difficult to conceive of an appealing distinction between this class of traffic and travel and that class simply using wagons, carts, carriages, or automobiles. It has no favorable distinction in volume, because the record in this case shows that 90% of the public using Dodge street adopt the carriages of the street railway company, (R. p. 76). This means of travel upon that street was authorized, as shown by the record, and no distinction arises out of this fact. The authorized use of this means of conveyance and public travel imposes no additional servitude either upon the street as such or upon the easement therein of the intersecting steam railroad company.

On this last point, the authorities are nearly without number, and we shall excerpt herein from but a few which largely typify the remainder which may be cited.

The question now under consideration has largely arisen out of attempts on the part of the street railway companies to cross the lines of steam railway companies where such intersect the public highway to be used by the street railway. Some involve attempts on the part of the steam railway to prevent the street railway from crossing at all, others from crossing without first paying or providing for such damages as the crossing of the street railway might entail upon the steam railway.

In *C. B. & Q. Ry. Co. vs. Steele, Receiver,* 47 Nebr. 741, the question was the right of the street railway company to project its tracks across those of the steam railway without paying such damages as might be caused thereby. The court stated that the question distinctly presented by the record was whether a steam railroad company which had by ordinance acquired a permanent easement in the streets of the City of Lincoln, was entitled to compensation from a street railway company as a condition to the crossing of its tracks by the latter, under a grant of power from the city.

The claim was made by the steam railway company, as is usually the case in such controversies, that the crossing of its tracks by the street railway company would be a burden and a hindrance to the free and unobstructed use of its property and would amount

to the taking of its property without just compensation and in violation of its constitutional rights. This view was rejected, though conceding more or less obstruction, inconvenience and interference, on the ground that the steam railway company had obtained its easement and rights at street crossings burdened with the easement in the public generally and that the street railway company, having been authorized to use the streets at that point, was entitled to use the public easement and that all the rights of the steam railway company were obtained subject to the right of the street railway company so to use the streets; that the steam railway company never owned its right-of-way over and across the streets free from the public easement, and therefore, there was no taking of its property in the constitutional sense. This opinion is an extended one and cites as supporting its view, among others:

N. Y. & H. & H. Ry. Co. vs. Bridgeport Traction Co., 32 Atl. Rep. (Conn.) 953;

Chicago & C. T. Ry. Co. vs. Whiting H. & H. E. C. St. Ry. Co., 139 Ind. 297;

Du Bois T. P. Ry. Co. vs. Buffalo R. & P. Ry. Co., 149 P. St. 1;

C. B. & Q. Ry. Co. vs. West Chicago S. Ry. Co., 156 Ill. 255, 40 N. E. 1008, 29 L. R. A. 485.

All these cases arose under a state of facts and controversies quite similar to that presented in the Nebraska case, and the same rulings were made therein on substantially the same grounds and for the same reasons stated in the Nebraska case. In one of the

cases there is a stronger statement of reasons, as for instance the *Du Bois T. P. Ry. Co. vs. Buffalo R. & P. Ry. Co., supra,* it is said that the crossing of the steam railway's tracks by the passenger railway company gave no greater right to damages in the view that the court took of the case, than that company would have had if the claim was made against an omnibus line.

In *Atchison T. & S. F. Ry. Co. vs. General Electric Ry. Co.,* 50 C. C. A. 424, 112 Fed. 689; the steam railroad company sought to enjoin the crossing of its tracks by the street railway company on one of the streets of Chicago, alleging that its property and rights would be damaged beyond compensation; and its constitutional rights violated in the respect that its property would be taken without just compensation. The court observes that the decisions of Illinois are to the effect that the steam railway acquired no exclusive right in the streets which it crosses but merely a subordinate right to the use of the street for ordinary street purposes which included the operation of street railways thereon. That the damages in delays of trains and the resulting inconvenience therefrom and such other damages as might be entailed thereby, were those in contemplation when the easements were given it to cross the public streets. That no additional servitude was imposed upon the easement of the steam railway company to that contemplated at the time it accepted such easement. That the operation of street railways, under authority so to do, through and over the public streets, was of the

purposes for which the streets are dedicated. That the steam railway acquired no exclusive rights by virtue of its permit, but that such rights as it acquired were to be used in common with the other purposes for which streets exist and included among these, the operation of street railways thereover. A great number of authorities are cited in this opinion in support of its conclusions.

We shall content ourselves with a mere citation of the following as fully supporting the contention under this head of the brief:

Southern Ry. Co. vs. Atlanta Rapid Transit Co., 111 Ga. 679, 36 S. E. Rep. 873;

General Elec. Co. vs. Chicago I. & L. Ry. Co., 39 C. C. A. 345, 98 Fed. 907; affirmed on rehearing, 46 C. C. A. 629, 107 Fed. 771;

Elizabeth Town L. & B. S. Ry. Co. vs. Ashland Ry. Co., 96 Ky. 347;

Texas & P. Ry. Co. vs. Rosedale St. Ry. Co., 64 Texas 80;

Missouri Pac. Ry. Co. vs. City of Omaha, 117 C. C. A. 12, 197 Fed. 516;

Southeast & St. L. Ry. Co. vs. Evansville & M. T. V. E. Ry. Co., 169 Ind. 339.

(b) The Legislature of the State of Nebraska had delegated to the governing authorities of the City of Omaha ample power and authority to require appellant to construct at its own cost the viaduct in question of sufficient strength, width, capacity and grades to carry and safeguard all travel and traffic on Dodge street at the intersecting point including that carried by The Omaha & Council Bluffs Street Railway Company.

1. As has heretofore been stated, appellant chal-

lenges the authority of the State to require it, at its own expense, to construct a viaduct sufficient in strength, etc., to carry the street railway passenger traffic over the point of intersection of its road with Dodge Street. While this challenge is made distinct and defiant in parts of its brief, such as appears on the first part of the 15th page, bottom of page 19, top of page 20, the latter part of the 27th page, and in other parts of the brief, yet there is an increasing tone of weakness and doubt throughout the argument on that aspect of the case and refuge and escape is finally sought in the added claim and contention, that the city authorities of the City of Omaha, assuming the existence of the power in the State, had not been authorized by the Legislature of the State of Nebraska to require appellant to construct a viaduct over its intersection with Dodge Street of sufficient strength and capacity to carry over the point of danger the passenger traffic of the Omaha & Council Bluffs Street Railway Company. True, appellant does not directly concede the power in the State to authorize its municipalities to do the things complained of. The concession attributed to it is one of the apparent unavoidable inferences from the arguments advanced and used in the brief of appellant, as for instance on page 17 of the brief, it is said:

> "Although there is in the bill of complaint a formal protest against the constitutionality of such legislation, yet the actual question presented to the lower court was not whether the statute

was valid, and whether under its provisions a viaduct might have been required by the City of Omaha at the crossing in question, but rather whether the City of Omaha has the right, under the Constitution and Laws, to require the kind of viaduct which is demanded in this case. The question is, therefore, not one of the existence of the power, but only of its abuse."

As we understand the above quoted language, it still contains a veiled challenge of both the authority of the Legislature and of that of the city to require a viaduct of sufficient strength and width, at the sole cost of appellant, to carry over the point of danger at the intersection of appellant's road with Dodge Street, the passenger street car traffic. The city's authority under the Constitution of the United States is challenged. This challenge searches the record and carries the inquiry to the source of power. If the power resides in the Legislature, it could be delegated to the city, and no question is made on this point. "Abuse," as the term is used in the above statement may, therefore, very well mean the attempted exercise of authority which, because of the Constitution could not be vested in the city, or, which under the legislation has not been vested in the city.

The first aspect has been discussed and we leave it with that discussion, and the second aspect remains to be considered, and this brings us to the second of the questions proposed early in this brief, "whether or not the Legislature has delegated to the authorities of the City of Omaha, these requiring powers."

2. On pages 15, 16 and 17 of appellant's brief, the Legislation of the State with reference to viaducts in cities of the class to which Omaha belongs, is set forth. On pages 24 and 25 thereof, a part of the ordinance adopted by the electors consenting to the operation of street railways in said city, is set out, and on page 25 is set forth a section of the charter of said city relating to the crossing of streets by railway tracks, etc., and certain requirements with reference to the operation of street railways and their cars, etc., and on that same page reference is made to certain provisions of the statute of the State of Nebraska with reference to street railways and their operation. It is hoped that such reference to these various provisions may be all that is required herein and that need for their restatement may thereby be avoided. These various provisions seem to contain all the legislation of material import upon the controverted matter.

Upon them is builded the contentions; first, that the City of Omaha has not been delegated authority by the Legislature of the State to require the construction of a viaduct at the sole cost of appellant, sufficient in width, strength and otherwise, and to maintain it, to carry over the point of danger the passenger street traffic of the Omaha & Council Bluffs Street Railway Company; second, that the Legislature of the State of Nebraska, in connection with the consent of the electors of the city has given the City of Omaha certain powers and authority in respect to requiring the street railway company to protect and care for its traffic

upon the streets of the city, which power may be sufficiently broad and comprehensive to require the street railway company either to discontinue the operation of its system over Dodge Street where appellant's road intersects that street or to participate in the expense of the construction of a viaduct at that point. The argument on this latter phase, however, seems to lack confidence in the position assumed, and closes by declaring that it is unimportant in this controversy whether or not the city has such power or whether or not it may be required to resort to the Legislature for added powers in such respects, as appears from the argument on pages 26 and 27 of appellant's brief.

On the first point last above stated, and respecting the authority which the Legislature has committed to the charge of the city, it is strenuously insisted that the power has not been given thereby to the city which would enable it or justify it in requiring a viaduct sufficient to carry the street car traffic. It is not pointed out wherein the legislation is lacking or short in that respect. No specific complaint is made of the language employed in that behalf, nor is it contended that the language used in that legislation is sufficiently broad and comprehensive to include not only steam railways but alike street railways. Nor does it seem such complaints could be well founded.

An inspection of this legislation and the language employed in it, seems more than convincing that it was the purpose of the Legislature, well accomplished by this act, to delegate to the city authorities of the

City of Omaha whatever power and authority it itself had or could exercise in respect to requiring steam railroads intersecting the public streets of that city, to abate the dangers which were thereby caused to the public travel in the rightful use of the streets. The statute does not attempt to classify the dangers to be anticipated, nor does it attempt to classify the use of the streets to which protection is to be afforded. The language is: "whenever any such viaduct shall be deemed and declared by ordinance necessary for the safety and protection of the public, then the mayor and council may require any railway company or companies owning or operating any railway track or tracks upon or across any public street or streets of the city, to erect, construct, reconstruct, complete and keep in repair any viaduct or viaducts, etc." It is difficult to conceive on what theory a claim may well be founded, that authority has not been given thereby to the city to require the construction of the viaduct here in question, as required. It is difficult to conceive what power the Legislature possessed in that regard which it has not directly delegated to the City of Omaha.

In construing this legislation, it will be borne in mind that its evident purpose was to delegate to the city authorities whatever power the Legislature may have itself possessed and might exercise to the end that a duty which lay upon it might be fully performed by agencies of its selection. The duty resting upon it was equally imperative to safeguard all travel right-

fully upon the public highways by the modes and means then employed and well known to exist. To accomplish this end, must be presumed to have been the purpose of the Legislature in its delegation of authority to the city. It made no express reservations to itself, it imposed no restrictions upon the city authorities in that behalf. *State vs. Redmon,* 134 Wis. 89, 114 N. W. 137. Speaking to like questions as the ones here involved, that court says in relation to the construction of a statute and the ascertainment of its purpose:

> "The inquiry as to an enactment respecting its legitimacy includes these, 'does a danger exist? Is it of sufficient magnitude? Does it concern the public? Does the proposed measure tend to remove it? Is the restraint or requirement in proportion to the danger? Is it possible to secure the object sought without impairing essential rights and privileges?' The judgment of the Legislature is to be taken as correct unless it appears to be wrong beyond reasonable controversy."

Moreover, the fact that authority was not given or attempted to be given by the legislation to the city to require street railway companies to protect such dangers or to participate in the expense of avoiding them, must be regarded as strong proof, at the very least, that such traffic was known to be and generally regarded as, when properly authorized, a part of the ordinary and usual public traffic upon the streets. Without question, apparently, the legislature might have required the public, that is the city, the railway

companies, and the street railway company to share alike or proportionately, the expense of abating dangers at intersecting points, or it might cast that burden, as it has, upo nthe steam railway company, upon the public, as it has in part, or upon the street railway company. We have the sanction of this court for this last declaration:

Detroit, Fort Wayne & Bell Isle Ry. Co. vs. Osborn, 189 U. S. 383, 47 L. ed. 860, 23 Sup. Ct. 540;

C. B. & Q. Ry. Co. vs. Nebraska, 170 U. S. 57, 18 Sup. Ct. Rep. 513.

In the former of the above cases, the question was presented relating to the power of the Commissioners of railroads to require an apportionment of costs between steam railways and city street railways respecting dangerous crossings. The Commissioners had ordered the street railway to install certain safety devices. Their power so to do was questioned by the street railway company. The commission was given legislative authority to make the requirement.

This court in passing upon the matter, in part says that the contention made by the street railway was that it had acquired the right of the use of the streets in common with oher members of the traveling public, was not an additional burden upon the street but merely an adaptation of the highway to a particular manner of travel which did not constitute an additional servitude. On the other hand, it was contended that the steam railroad did impose an additional servitude and

that it should be required to do the things necessary to render the highways which it crosses safe. The court then says:

> "It may be that this difference is recognized as to abutting property owners or crossing railroads, but it cannot be recognized as limiting or affecting the power of the state to regulate the management of the railroads in view of the dangers of their operation to the public. Whether electricity be the motive power or steam be the motive power, there is enough danger in the operation of either to justify regulation. * * * It is manifest, as the Supreme Court of the State observed, that the crossing is a place of unusual danger, not only to the passengers of the steam cars but also the passengers of the electric cars and that the danger is caused by both. In such situation, the city is surely not powerless to act, nor before acting must it ascertain the effect or quantum of damages caused by each road."

In the latter of the two cases, the constitutionality of a statute of this state in all respects is about the same as the statute under question, as well as the power of the city to distribute or apportion the costs of abating or preventing dangers at public highways intersected by the roads of the company, was under question. It is said that there rested the equal duty on the city and on the railroads to guard the safety of the public by erecting proper viaducts. That it did not follow, in the absence of express agreement to that effect, that such duty was devolved upon one of the parties to the relief of the other. That the paramount

duty of the legislature to secure the safety of the community at an important crossing within a populous city was such as to authorize the legislature to supervise and control in such matters. That even an agreement among the parties liable would not be sufficient to withdraw the subject from the reach of the police power and that the parties could not substitute in this manner their views of the public necessities for those of the legislature. It was complained that the requirements of the ordinance as to the division of the expenses between the railroads were such as to make its action arbitrary and contrary to the principles of justice. It was thereupon observed that it would have been competent for the legislature to have put the entire burden upon any one of the parties or to have apportioned it as it saw fit, and that it might accomplish the same ends through the instrumentality of the city council, that the city council was not directed to proceed judicially but simply to exercise legal discretion.

But to permit or to authorize the city council to require the street railway companies to abate such dangers or participate in the expense thereof, may, and doubtless would, require additional authority from the legislature to that now existing. This apparently has not been granted it as yet. Why and for what reasons it has been withheld is probably not important to this discussion. This fact, in our judgment, does not wither the arms of the law to that extent that in the exercise of police power expressly delegated to the city council, it cannot require one of the admitted au-

thors of the wrong to make the necessary outlay in order to correct the evil. The thought is hardly tolerable, because in that event all that would be required to bring about enforced inaction would be for the parties to disagree as to the undertaking.

Suppose, as is contended, the steam railway companies may be required to construct a viaduct only sufficient to carry what it terms the ordinary traffic on the public streets; assume the city to be without power and authority to require the street railway to provide against such dangers, and in that situation the city orders the steam railway companies to construct a viaduct and it develops that the street is only of such width as to require all of it for the viaduct as ordered at that point. We would then have a situation denying to a large part of the community the means of conveyance on which it was dependent largely and which had been instrumental in building it up and the further situation of obstructing entirely the street to that use, thereby denying to the street railway the very use which the franchise rights give it and denying to the public the very benefits which was sought in the grant of the permission to the railway company to use the streets.

Moreover, the city could not lawfully obstruct the entire width of the street and thereby enforce an abatement of the street car traffic thereover.

City of Chicago vs. Chicago & O. P. Elv. R. Co., 95 N. E. 456;

In this case, it is said:

> "The right of a city, by the exercise of its police power, to regulate any business or the use of any property, does not give the power to prohibit the conduct of a lawful business, or to entirely suppress the use of property."

The legislature must have had in mind these situations when it enacted the law in question and had there been any doubt as to the intention of the legislation, as to whether or not the steam railways were required to construct at their expense a sufficient viaduct for the street railway traffic, ample remedy would have been provided to meet such contingencies. There is nothing apparently in the street railway act of the state or in the ordinance granting the street railway consent to use the streets, which may be said to aid the contention that the city possesses the authority to require the street railway company to share in the burden and expense of the construction of a viaduct. *Louisville & N. Ry. Co. vs. Hopkins County et al.*, (Ky. C. A.) 156 S. W. 379.

It seems to us, therefore, that it may be confidently insisted that the legislation in question was clearly intended to enable the city authorities to require intersecting railroad companies with its public streets to construct viaducts thereupon and thereover at the intersecting points and at their own expense, sufficient in all respects to take care of and protect against the dangers which it created, all ordinary public travel including that carried over the lines of the street railway companies, rightfully upon the street. We repeat that

in the light of the duty the state and municipality owes to its public, in the light of the legislation enacted in respect to these matters, including what was done as well as what was not done, and in the light of known conditions and modes of travel and the difficulties in the exercise of such powers, no purpose could be more manifest in the legislation than a purpose to empower the City of Omaha to require the construction of such viaducts as would fully meet the needs and discharge the duties in safeguarding all highway uses. We think the language employed in the legislation without ambiguity in this respect and abundantly sufficient to accomplish this end.

3. We do not understand that appellant seriously contends that if the legislation referred to is such as authorizes the city authorities of the City of Omaha to require it to construct its viaduct of sufficient strength, width, capacity and grades necessary to carry over the point of danger the street railway traffic, then the city council, in ordering the viaduct as it did, acted arbitrary or unreasonable in this respect. We gather that the contention made in that behalf rests primarily and essentially on the proposition that such power had not been delegated. It seems elementary and of admitting little or no controversy that delegated authority may be exercised in the manner and within the limits of its delegation. Any arbitrary action, assuming the authority as delegated, would result in the manner of its execution. On this point and as to that phase, there appears to be no complaint or controversy. The author-

ity has been exercised in the terms delegated. The terms on which this authority may be exercised by the city is no longer an open question in this state, having been put to rest by the case of *C. B. & Q. Ry. Co. vs. Nebraska*, 47 Nebr. 549, and its affirmance in this court reported in 170 U. S. 57.

It is true in the above case, the Nebraska Supreme Court said:

> "It will not, of course, be contended that the power of the legislature is, in that respect, absolute, or that it may at will impose upon property burdens so unreasonable as to work a practical confiscation, there is, as all admit, a limit beyond which it cannot go, and within which it will be confined by the judicial power of the state."

It is obvious that these remarks are made with reference to the power of the legislature and did not relate to the manner of the exercise of that power.

In the above case and speaking with reference to the complaint of the manner in which the city council had exercised its powers, this court observes:

> "The latter was not directed to proceed judicially, but to exercise a legally delegated discretion."

In *State ex rel City of Omaha vs. U. P. Ry. Co. et al.*, 143 N. W. 918, Nebr., decided October 31, 1913, among other things, it is said:

> "Within constitutional and statutory limits the mayor and council of the City of Omaha are the sole judges as to when and how the police power of the municipality shall be exercised in requiring

railway companies to construct viaducts over their tracks where they cross public streets at grade."

"In considerating the validity of an ordinance directing railway companies to construct a viaduct over tracks which cross a public street at grade, it will be presumed that the mayor and council acted with full knowledge of existing conditions relating to municipal legislation on that subject."

See also *State vs. Redmon,* 134 Wis. 89, 114 N. W. 137.

In this connection, and on page 22 of appellant's brief is cited the cases of:

Rogers Park Water Co. vs. Fergus, 178 Ill. 751, 180 U. S. 624;

Chicago vs. Rogers Park Water Co., 214 Ill. 212.

These cases are cited for the avowed purpose of calling the attention of the court to the important distinction between the constitutionality of a delegated power to a municipal body and the unlawful limits to which the municipality might go in its attempted exercise. We have no contention with the correctness of the rule as therein laid down, but are at a loss to understand what possible application could be made of the rule in the instant controversy. Its citation may serve to show that counsel for appellant, in some way not made plain, is contending, as to this aspect of the controversy, that the city council in ordering the viaduct, though authorized to so order it, proceeded in an arbitrary manner and in violation of appellant's rights. We have in mind no distinct proposition of that character made by it in the brief. Throughout

this entire discussion, we have insistently contended that the city authorities had been given the power which they undertook to exercise and were exercising it to the extent and in the manner in which it had been given. We have ever been mindful that a general grant of power without specification of its mode of exercise would be required to be exercised within the grant and in a reasonable manner and that any such attempt at all times might be open to inquiry before the courts.

It is no doubt true, as an abstract proposition, that if no necessity whatever existed for requiring a viaduct at the point in controversy, then, even though the city council may be authorized to require a viaduct, yet its exercise under this assumed condition would no doubt be arbitrary and would constitute an abuse of authority. Of course, under this record, this abstract proposition has no application. The above furnishes the only instance that we can think of wherein the claim and contention might be justified that the city acted arbitrarily in ordering the viaduct; because having admitted the necessity, the broad discretion vested in the city by the statute as to the manner of the exercise of the power is such as to protect it against any serious attack as to it being arbitrary.

Where authority has been given or exists to require the construction of a viaduct and where the need for such has been determined and exists, the mere error in judgment or excess in the exercise of the power in the accomplishment of the end sought, if in good faith,

is not sufficient to characterize the acts of those charged with such discretion as arbitrary. This seems too elementary and too well etablished to admit of controversy.

C., B. & Q. Ry. Co. vs. Nebraska, 170 U. S. 57;
Missouri Pacific Ry. Co. vs. City of Omaha, 117 C. C. A. 12, 179 Fed. 516;
State vs. Redmon, 134 Wis. 89, 114 N. W. 137.

If there were no danger whatever to the public at the point in question, if no necessity existed for a viaduct thereat, and if it were required by the city authorities for the sole and only purpose of conferring a benefit upon the street railway company, as seems to be contended by appellant in its brief, as to the latter, then, without doubt, the requirements would be arbitrary, unwarranted and utterly indefensible. This claim is so wide of the mark, so little supported by the record or any of the facts in connection with this litigation and so obviously self-destructive as to require little or no assistance to its final disposition. It serves, however, to illustrate the desperation to which appellant is reduced to offer some claim which might avail it in this struggle. There can be no presumption that such was the purpose of the city council. The mere fact that the viaduct was required to be of such width and strength as to carry the street car traffic, does not admit of such presumption; there is an entire lack of evidence to support the claim. On the contrary, it is conceded that this point is a point of danger and that the danger is as great or greater to

the street car traffic as to any other traffic on the street. The record clearly shows that the city authorities determined the fact that such point was one of danger and determined that the need of a viaduct thereat existed. To them was committed this power, duty and authority. They owe this duty to the public and they owed no duty or obligation whatever to confer benefits and favors upon the street railway company.

Assuming for the purpose of this argument that it might be said that thereby an incidental benefit was conferred upon the street railway company, can it be said that this is all sufficient to convert a declared and undertaken public duty into a private gratuity so as to abort and palsy all action to the accomplishment of such public purpose? To state the proposition is to furnish a negative answer. Besides, this court has recently spoken decisively on the city's side of the claim.

In *C. B. & Q. Ry. Co. vs. Illinois,* 200 U. S. 561, 50 L. Ed. 596,

the question of the power of that state, through the drainage commissioners, to require said railway to increase a culvert in its tracks and to do all things necessary to an increase thereof at its own expense which, under the circumstances of that case, were very burdensome, was involved. The contention was made there that a culvert had been constructed to meet all requirements of the drainage district as it had been created at the time of the construction and that the

larger district and larger drainage sought to be served by the requirements of the order in question, was made for the purpose of aiding the land owners within the district and of benefiting the public thereby and constituted the taking of property of the railway company for public purposes without just compensation and in violation of other claimed rights under the Constitution. (Page 591.) On this point, the court says:

> "We cannot assent to the view expressed by counsel. We hold that the police power of the state embraces regulations designed to promote the public convenience or the general prosperity, as well as regulations designed to promote the public health, the public morals, or the public safety."

Citing many cases.

The views of the Supreme Court of Nebraska are in accord with the views of this court as stated above.

In *Phoenix Mutual Life Ins. Co. vs. Lincoln,* 91 Nebr. 150,

there was involved in this case the question whether or not under the charter of the city of Lincoln the railroad companies might be required to pay all the costs of construction of a viaduct including all damages resulting to property owners. (This statute being more burdensome than that of the city of Omaha.) Speaking to this point, and on pages 156-7, the court, in part, says:

"It would therefore seem that when such companies, in the performance of that duty, are required to construct and maintain viaducts, they are liable for the costs of such construction and all the necessary incidents thereto. * * * If public convenience and necessity, by the growth of the city and the resulting increase of travel, require the change in order to restore the street to its former usefulness, the duty of the company, under its charter, which was before inchoate, is complete, and the same responsibility adheres to it as if the work was demanded for its corporate benefit alone; and to the responsibility in the performance of the work are attached all the legal consequences which flow from the improper and injurious performance of it. The fact that the duty is by law imposed upon the company is sufficient to charge it with all the consequences of such an execution of it as results in injury to others."

The Circuit Court of Appeals in disposing of the present case when before it (R. P. 187), observed:

"It may be conceded that if the case before us were not one of the exercise of the police power of the state through the medium of the city, but were to be determined according to equitable principles, we would think the street railway company should be required to contribute to the cost of the viaduct and perhaps the city itself, as the representative of other interests. But, whether the power of the state is competently exercised or its exercise violates the Constitution of the United States, is not to be determined by a court solely by its own sense of right and wrong. Legislation, under the police

power, is naturally along general lines and it is rare that immediate and exact justice is done to all who may be effected by it. The books are full of cases, which we are constrained to follow, of equal if not greater hardships in which special loss is uncompensated save by participation in the common public good. See citation in *Railway vs Drainage Commissioners,* 200 U. S. 561."

4. What has been heretofore said in subdivision (a) of this brief respecting the power and the duty of the state in the interest of safety to its highways and the public rightfully thereon, together with the authorities which we have cited in support thereof, apply with equal force and effectiveness to the exercise of this power and its application by the city council, assuming, as we think we have shown it to be a fact, that the state's power in that behalf had been delegated to the municipal authorities of the City of Omaha to be exercised by it under the same conditions as the state might exercise it; and restatement and repetition thereof would be but the work of supererogation.

So, likewise, as to a restatement of the controlling reasons and adjudications, as advanced in subdivision (a) hereof in respect to the duty and the purpose of the state to safeguard and protect all lawful travel upon its public highways, whether that be by means of street railway conveyances or otherwise, and of the nature of the travel and traffic of the passenger street railways and of its easement as well as its character as to being an additional servitude. Repetition thereof

would furnish no additional light and would not be justified on the claim of mere emphasis.

Speaking to some of the contentions, in the instant case, in this respect, the Circuit Court of Appeals, (R. p. 187) further observes:

> "Though the specified width and strength of the viaduct may have been essential to its use for street car traffic, the object the city had in view was not the benefit or advantage of the street railway but on the contrary, was the safety and convenience of the public traveling over the street by any and every lawful means. The advantage that might accrue to the street railway company was incidental to the exercise of the power, the existence of which in the particular case, cannot be doubted. The operation of street cars is a proper street use, and none the less so that the cars are commonly given certain rights of precedence over other vehicles on the streets, or that the business is usually conducted for profit by a corporation under a franchise. Not only is it a proper street use but in populous communities, it may be one of public necessity. The nature of the use is not effected by a matter of precedence over other traffic which is largely for mechanical reasons, nor by the taking of fares under corporate franchises."

It seems to be the settled law of the State of Nebraska that a street railway company operating its equipment in the public streets of the city, are not entitled to claim or insist upon precedence over other means of travel and conveyance; for it is distinctly said in *Olney vs. Omaha & Council Bluffs Street Railway*

Co., 78 Nebr. 767, that the right to use the streets of a city by the driver of a horse and the manager of a street car, are equal, and each must use it with reasonable regard for the safety and convenience of the other.

5. It is finally contended by appellant, and some cases are cited to support that contention, that the state or the city is under no duty to construct viaducts, at the expense of the state or the city, to protect, care for, or safeguard street railway traffic; and that consequently it is powerless to require intersecting steam railway companies to do more in that regard than it is under obligations to do.

On its first statement, this argument appeared rather catchy and seemed to possess plausibility; on further consideration and reflection, we are impressed that it does little other than restate the other arguments in a catchy form and serves to remove the difficulty but a step further back.

It is the duty of the state to make its public highways safe. This court has so declared that duty and has said that from such duty resulted the power to accomplish that end. This duty it may impose upon steam railway companies as to the dangers which they cause. It might, if it saw fit, impose it upon each and all of those producing the danger or the state might impose it upon itself or upon the municipal subdivision within the limits of which the danger existed. We have heretofore cited cases showing clearly that these many things might be done. Whatever may be the rule in other states, under their respective systems of juris-

prudence and statutes, we think it may be safely asserted that it is the duty of cities in the State of Nebraska, where they have not been relieved of that duty and it has not been imposed upon others, such as steam railways, either to construct viaducts, erect guards, establish and maintain signals or to do what else and what other things that may be necessary to safeguard all public travel by street cars or otherwise, at the expense of the state or the community. We can conceive of no reason which would seemingly justify a claim or contention that the measure of the community's duty in that regard would fall short of the dangers to be prevented.

It may be discretionary with the state or with the city as to whether or not it will establish for public travel any particular highway or street, but when that highway or street is established and becomes used by the public as such, then it is the rule of the courts of this state, and we think the country over, that the duty is an imperative one to exercise reasonable care to the end that such highways or streets may be kept in a reasonably safe condition for public travel. This includes all travel rightfully thereon and thereover. We can think of no distinction which would exclude street car travel and include other kinds of travel. No distinction seems ever to have been made in this state, none suggests themselves.

Doubtless, the state or the city might determine whether or not a highway or a street should be opened for public travel and doubtless restrictions as to the

kind of travel thereon and thereover might be imposed, to the extent of excluding street car traffic as a part of the allowable travel over the highway or street, but when once established as a highway or a street and used by the public as such for all purposes of public travel including established street car traffic thereover, then so long as the unrestricted travel is permitted there must exist a duty co-extensive with the need to protect the travel on such highways or streets.

We think that this last suggestion may largely distinguish the cases cited by appellant in that regard, because each case relating to such matter seems to involve the question of whether or not bridges constructed by the railroad company before the street car traffic arrived, might be required to be strengthened and possibly enlarged at the expense of the steam railway company to the end that the street railway might project and use its lines thereover without expense to it for such repairs. But whether distinguishable or not on this ground, it is made quite clearly to appear from a reading thereof that each of these cases arose under statutory authority not nearly so comprehensive broad as the statutory authority given the City of Omaha in respect to the requirements of viaducts. It is no less clear and definite that the limitations therein imposed upon the police power in that regard are far more restrictive than the limitations which the courts of this state have sanctioned and we feel equally confident, far more restrictive than this court has or would

sanction respecting the rights of the City of Omaha in the exercise of the police power of the state broadly conferred upon it under the statute in question. We believe that in each of the cases cited, had the question arose under statutes as broad and comprehensive as that under which the City of Omaha was acting, the decisions uniformly would have been that the requirements might be enforced. Unless the jurisprudence of the respective states from which the cases come compels an interpretation and construction of the police powers thereof as inadequate and lacking in breadth and purpose to accomplish the ends which the duty of the state or municipality owes to its traveling public.

It will be observed that *Briden vs. Railway Company*, 27 R. I. 569, 65 Atl. 315; is the only case cited by appellant which seems to hold that it was not the duty of the city to prepare at its expense, streets suitable for street railway traffic and that therefore, the city could demand from the steam railroad no higher duty than the city owed to the street railway.

..*People vs. Adams*, 88 Hun. 122; involved the validity of special assessment against steam railway property to defray expenses incurred in strengthening a viaduct so as to enable the street railway to use it, and such reasons as were given against the special assessment seemed to turn upon the proposition that the city could require steam railroads to provide for the safety of the ordinary and usual travel such as horses, carriages, etc.

Carolina Central Ry. Co. vs. Wilmington St. Ry. Co., 120 N. C. 520;

This case involved the right of the city to compel a steam railway to strengthen an existing bridge at its expense, to accommodate street railway traffic which had been authorized over the street. This case likewise turned upon the view that the steam railway could be required only to provide facilities for ordinary travel, such as carriage and cart travel.

The other cases cited seem not to have arrived at any definite conclusion on the points herein mentioned and refused to commit themselves to any doctrine in that regard.

II.

In the second subdivision of appellant's brief, commencing on page 39 thereof, and respecting its fourth assignment of error, it makes the contention that the city required the proposed viaduct to be of an unreasonable length and claims the purpose of this requirement is to carry the street traffic on Dodge Street over what it terms a "hypothetical boulevard," which the city at some future time proposes to construct.

It is insisted most strenuously that the need for this added length, except for the purpose stated, is so utterly absent and without foundation in fact as to make the requirement on the part of the city unconscionable, arbitrary and vicious, so much so, as to make its acts a wanton confiscation of the railroad property for public use, without the pretense of compensation. (pp. 46-47, appellant's brief.)

It is further said on page 43 of the brief that "it stands boldly admitted and asserted that the purpose is to compel the railroad company to defray the costs of carrying the street car traffic over the city boulevard." From this, it is argued that the city authorities, in requiring the additional length, manifestly abused their powers and authority in that regard, conceding, however, that the source of such authority was the police power of the state, which might be exercised by the city authorities, but must be exercised reasonably.

Many cases are cited on page 43 of appellant's brief supporting the contention that the police power of the state is subject to all the limitations of state and federal constitutions. We make no contest as to this contention. We unhesitatingly concede its substantial correctness when applied to a situation or state of conditions, which, under well recognized principles, calls for or will admit of its application.

This, therefore, remits the instant problem for solution to the state of the record, in the first instance, and in the second instance, to the principles to be applied thereto in connection with such statements and adjudications as may have been had thereon.

(a) The circumstances and situations surrounding and attending the construction of a viaduct at the point mentioned, were and are such as to require such length of viaduct as was ordered by the alternate plans, namely, 810 feet.

1. It is said on page 39 of appellant's brief that the trial court disposed of this objection with the find-

ing that such extension of the end of the viaduct was made necessary by reason of the grades, and the purpose was not to compel the railroad to erect a viaduct so as to clear the boulevard. It is then said that such proposition is utterly without support in the evidence, as well as the pleadings. With reference to this claim and contention the record seems to show: In 1908, plans and general specifications were prepared for viaducts (R., p. 26-27). These plans were revised in March, 1909 (R., p. 27). Ex. 1, 2 and 3 (R., p. 104). The revision of the original plans were termed "Dodge Street viaduct, alternate plan to accompany original plan" (R., p. 27). As to some of the constructional features of the required viaduct, in any event, the two plans mentioned were to be used together (R., p. 28). The so-called revision or alternate plan was adopted by the city council (R., p. 28), and approved by the city council July 13, 1909, the mayor, July 15, 1909. (Ex. 2 lower left hand corner, R., p. 105) (R., p. 30). The engineer of appellant in charge of the preparation for the construction of the viaduct understood that the two plans referred to were to work together (R., p. 37). The total length of the viaduct as shown by the original plan was 695 feet (Ex. 1, R., p. 104). The total length of the viaduct as shown by the revised or alternate plans was 810 feet (Ex. 2, R., p. 104).

This change in the length of the viaduct from that shown in the original plans (Ex. 1) to the length shown in the alternate plans (Ex. 2), discloses that the mayor and council, and other officials of the city charged with

the duty of requiring a proper viaduct were not satisfied with the length specified in the original plans and regarded the length specified in the alternate plans as the proper length. This change of requirement as to length was one rightfully within the discretionary powers of the city authorities and no abuse of that discretion can be justly charged merely because a change was made. Does the record show any other or further facts or conditions in this regard which might be justly urged as an abuse of a conceded discretion?

But two witnesses testified respecting the grades and the physical conditions of the proposed viaduct, its approaches and the surrounding streets. One of these witnesses was the engineer of appellant. The other was the city engineer of the City of Omaha. Witness Smith, appellant's engineer, testified that the grade on the east end of the viaduct proposed by the alternate plans, for a distance of 390 feet to the east of the center of the tracks was 3.23% and that on the east approach the grade was 6.02% (R., p. 41). That a grade of 3.23% was unnecessary (R., p. 41), but that 8% grade would not be unreasonable (R., p. 42). That the east end of the proposed viaduct was 577.65 feet. That with 8% grade and reduction of floor space to 2 ft., 300 ft. would be the require length on the east end (R., p. 42). Witness Craig, engineer for the city, testified that to shorten the length of the viaduct to less than that required would make the grades of the approach in excess of what they should be (R., p.

82), would make them too steep (R., p. 83). That under known conditions and at certain times of the year it would be dangerous (R., p. 83); regarded the length of the viaduct as ordered as short as practical (R., p. 83); that the east end of the viaduct, as proposed by the original plans, was located practically on a strip of land crossing Dodge Street at that point practically at right angles and owned by the city and used by it for sewer purposes and called Saddle Creek Sewer right-of-way, of the width of 60 feet (R., p. 83); that the east abutment of the viaduct under the original plans would be approximately 60 feet east of the east line of Saddle Creek Sewer right-of-way, that such construction would interfere with this strip, and that it would be impossible to use it for street purposes. Would block it in such a way that it could not get across (Dodge Street) (R., p. 83). That there is now a sanitary sewer built in the Saddle Creek strip. That plans are prepared and part of the system has been built for a large interceptor and that a part of this right-of-way of Saddle Creek Sewer was designed and secured for sewerage purposes and the surface for boulevard purposes (R., p. 84). That witness considered the grade as fixed by the alternate plan as the maximum that should be considered for a viaduct of the character in question (R., p. 85). As to the raising of the grade on Dodge Street where it was crossed by the Saddle Creek right-of-way, for the purpose of reducing the grade on the east end of the viaduct, if shortened, the witness said that it was

possible but that if the City of Omaha in finally deciding as to what should be done with Saddle Creek Sewer would conform to the surface of Dodge Street or to a grade that would be 2 feet higher than the present surface, it might be done; on the other hand, if a subway or crossing was made underneath to fit the contour of the country on either side, it could not be done. That is, if Dodge Street is raised, its surface will be placed above the property on both sides (R., p. 94), that to change the grade of Dodge Street would require the consent of the abutting property holders, that such would add damages which the city would be required to pay even though the consent might be had (R., p. 97). That as an engineering proposition the grades on Dodge Street where the east end of the viaduct rested could be elevated but that as a practical question or as an economical one or as one best adapted to the requirements, it should not be done (R., p. 97).

The testimony of the witnesses herein referred to, together with the evidence respecting the controverted situations, contains substantially all of importance on this point found in the record. We submit that it falls incomparably short of any and all requirements to show that the action of the mayor and council was arbitrary. Indeed, it might be seriously debatable whether or not it does not preponderate in favor of the city's action, and especially when considered in connection with other of the known facts which the record does not disclose, it clearly preponderates in the city's favor, and requires an honest and intelligent discre-

tion in that regard to be exercised in the manner that the city exercised it.

We, therefore, most respectfully submit that the city's actions in the regard herein complained of were required and fully justified by the conditions with which it had to deal.

(b) Even if the requirements of the city as to the added length to the end of said viaduct were to protect a proposed boulevard, constructed sewer lines and sewer pipes crossing Dodge Street under such boulevard or its abutments, we think the city had the authority rightfully to require it.

1. Appellant contends that the answer of the city admits such purpose on its part. We do not view the answer as admitting such to be the only purpose. It is said that the engineer for the city so testified, possibly the excerpt quoted might justify this statement but his evidence taken together will not justify the claim that he admitted the sole purpose of the requirement to be that which is claimed. But, be this as it may, we have heretofore set forth the substance of this witness's statements in that regard and appellant sets forth a part of the answer claimed to carry such admission, and they speak best for themselves.

It will likewise be recalled that the testimony of witness Craig as to what is called the Saddle Creek Sewer strip showed this strip to be some 60 feet in width, running parallel to the tracks of appellant and but a short distance from its tracks where each cross Dodge Street. This strip was acquired by the city for a double purpose, one, to carry a part of its sewer system under the surface; the other, as a continuation

of a large boulevard system of the city, on the surface. At the time in question, plans had been completed and were partly performed in the construction of a large interceptor in this strip. The fact of the existence of the strip and the appropriation of it largely to the purposes for which it was obtained, had become established conditions, and the city was dealing with a condition rather than a theory.

It would seem reasonable that the city should have the power and authority in requiring the appellant to abate the dangers which it had caused, to protect its streets, its boulevard system and its sewer system. For illustration, assume that the abutments or lower parts of the viaduct built to proper grades should fall squarely into and completely obstruct an established and open intersecting street, and could not be shortened sufficiently to avoid this on account of excess grades and added dangers, it would hardly seem that it could justly lie in the mouth of appellant to claim that the viaduct could not be extended, at its costs, so as to clear the intersecting street and allow it to remain open for public travel. As we view it, this aptly illuslustrates and epitomizes the contention presented by appellant.

It is further contended that of the purposes of the city in requiring added length to the viaduct, one was to carry the street car traffic over its proposed boulevard. On what evidence this claim is based is not apparent. The mere fact of the requirement seems to

be regarded as all-sufficient to determine an incidental effect as a dominant cause.

So, also, the city should be left free to determine whether, under all the circumstances surrounding it, it would raise the grade of Dodge Street so as to reduce the grades on the viaduct and to shorten the structure. In some instances, maybe in this, it would not be possible to procure the consent of the abutters to such change of grade, such consent being required under the charter of the city; in other instances, the damages might be so great as to make the construction of a viaduct prohibitive, in the absence of a discretion of this kind, or to make the expense to the public for the construction of a viaduct much greater than that to the railroad company, because under the charter of this city, the damages caused by the construction of a viaduct is to be borne by the city. Not so under the charter of the city of Lincoln, in this State. All these things are matters concerning which the city should be, and we believe is, vested with a large discretion.

Speaking to this very contention, the Circuit Court of Appeals in this case (R., pp. 187-188), said:

> "Legislation under the police power is naturally along general lines and it is rare that immediate and exact justice is done to all who may be affected by it. The books are full of cases, which we are constrained to follow, of equal if not greater hardships in which special loss is uncompensated save by participation in the common public good. See citations in *Railway v. Drainage Commissioners,*

200 U. S. 561. * * * The Nebraska statute expressly conferred upon the city, the power to determine the dimensions of the viaduct and approaches, but it is objected that the power has been abused. A court should regard such an objection with extreme caution, and all reasonable doubts should be in favor of the valid exercise of the power. The case should be a clear one to justify judicial interference; debateable differences of opinion are not sufficient. It would be intolerable if the courts should lightly substitute their judgement for that of city officers as to details of municipal improvements such as the sufficiency of grades, the necessity for public highways, the dimensions and strength of bridges and viaducts, and the like. The city was lawfully authorized to impose upon the company the entire burden of a sutable structure without loss or cost to itself and to determine within reason what kind of structure was needed. Clearly it could prescribe one which would not obstruct an existing highway or a highway in reasonable contemplation. * * * The company contends that if certain feasible changes in the plans were made the approach would be so shortened as not to reach the boulevard at all; by the plans that this would also necessitate the raising of the street grades, and whether that should be done with the probable damages to abutting property was for the city to determine. We do not agree with counsel that the purpose of the longer approach was to raise the street car tracks on Dodge Street over the intersecting surface of the proposed boulevard. Entire good faith should be imputed to the city as well as a desire

of the public good. Surface crossings of street car tracks and boulevards are so common that it cannot fairly be said that to attain such an unimportant object as to prevent a crossing in the present instance the city would arbitrarily plan an overhead structure which would be at once an expensive burden to the company and an obstruction and disfigurement of the proposed highway itself."

In *C. B. & Q. Ry. Co. vs. Illinois,* 200 U. S. 561, 50 L. ed. 596, was involved the requirements of the Drainage Commission, which it was contended were so arbitrary as not to be justified within the police power of that State and so burdensome as to amount to the taking of the property of the railroad company for public purposes without just compensation. The Commissioners had required the railway company to enlarge a culvert or bridge and to remove large timbers and other material placed therein and thereabout to prevent the channel from deepening. The purpose of the requirement was to enable the county to drain a much larger proposed area than that which had been drained through that source, resulting in making the land drained tillable and benefiting the section so drained. The statute under which the Commissioners were proceeding required them to make the necessary bridges and culverts across any public highway and provided that the costs should be paid out of the road and bridge fund tax, or by the railroad companies. The bridge of the company required to be reconstructed was a part of its road and had been con-

structed and used for many years prior to that time. It was contended that the orders so made were in excess of the powers of the Commissioners and were arbitrary and unreasonable and operated to take its property for public purposes without just compensation. On page 584, the court says:

> "Further, the regulations against which the railway company invokes the Constitution is a real, direct and obvious relation to the public object sought to be accomplished by them. In no sense are they arbitrary or unreasonable."

It is further said that the thought is pressed that the requirements in question has nothing to do with the health of the drainage district but will operate to reclaim the lands of the district and make them fit for cultivation. Speaking of this, it was said that the court could not assent to the views expressed. That it holds that the police power of a state embraces regulations designed to promote the public convenience or the general prosperity, as well as regulations designed to promote the public health, the public morals or the public safety. That the validity of a police regulation, whether established directly by the state or by some public body acting under its sanction must depend upon the circumstances of each case and the character of the regulation and whether really designed to accomplish some legitimate public end. That compensation has never been a condition of the exercise of the police power even when attended with inconvenience or pecuniary loss, because each member of a commun-

ity is presumed to be benefited by that which promotes the general good. The case of *New Orleans Gas Light Co., vs. Drainage Commissioners,* 197 U. S. 453, 49 L. ed. 831, 25 Sup. Ct. 471, is cited and quoted from.

In *Phoenix Mutual Life Insurance Co., vs. City of Lincoln, et al.,* 91 Nebr. 150, was involved the question whether the railroad company required to construct the viaduct, or the city, was liable for damages to an abutter because of resulting damages to his property. As we have said the charter of the City of Lincoln, unlike that of the City of Omaha, requires the railroad company to pay such damages to the abutter. The railroad company made the contention that such requirement could not be enforced against it, that it was arbitrary and resulted in the violation of its constitutional rights. The further contention seems to have been made that the company could be required to construct a viaduct only because required in the interest of safety. That the resulting damages were no proper part of the construction of the viaduct and grew out of the convenience to the public and that therefore, such damages could not be imposed upon it.

Responding to this contention, the court cites with approval and quotes a part of the opinion in *Burritt vs. City of New Haven,* 42 Conn. 174, from which the following excerpt is taken:

> "It is insisted that this case is essentially different from the one last cited, because here the bridge is found to have been require by public convenience and necessity only, while there, it was for the sole benefit and accommodation of the rail-

road company. We do not see that this distinction affects the obligation of the company in this particular. If public convenience and necessity, by the growth of the city and the resulting increase of travel, require the change in order to restore the street to its former usefulness, the duty of the company, under its charter, which was before inchoate, is complete."

Again, in *State ex rel. City of Omaha vs. U. P. R. R. Co.*, ...Nebr....; 143 N. W. 918, the question of the extent of the right to exercise the police powers by the city in requiring the construction of viaducts was involved. This was an application to require several steam railway companies to construct a viaduct over certain designated streets. The application was largely resisted on the part of the companies on the claim that the city's requirements were arbitrary, confiscatory in nature and resulted in taking their property for public purposes without just compensation and in violation of other asserted constitutional rights.

Among other things, it is said by the court that within constitutional and statutory limits the mayor and city council constitute the sole judges as to when and how the police power shall be exercised in relation to such matters. That the statutory justification for the exercise of the police power is the safety and protection of the public. That its authority in such respects may neither be abandoned nor bartered away.

In *State ex rel. Krittenbrink vs. Withnell*, 91 Nebr. 101, the case involved the exercise and application of the police power of the state and city respecting the

powers of the city authorities in regulating brick yards within the limits of the city.

Here, it is again said by the court, that within constitutional limits and concerning the exercise of the police power delegated to the city authorities by the State Legislature, such authorities constitute the sole judge of what laws should be enacted in the municipality for the welfare of its people and as to when and how such power might be exercised. That within such limitations private property is held subject to proper rules regulating the common good and the general welfare. That in testing the exercise of police regulations the court should inquire whether they have some relation to the public health, safety or welfare and whether such is in fact the end sought to be attained thereby.

In *State vs. Redmon*, 134 Wis. 89, 114 N. W. 137, there was involved the right of conviction for the violation of the 1907 laws of that State regulating berths in sleeping cars. This law having been passed in the exercise of the State's police power. It is said that legislation under the police power, as in other fields, is subject to constitutional limitations, some expressed and some implied. That reasonable police regulations are not inhibited by the Constitution even though invading its letter, since the exercise of such power is so essential to the public welfare that it will be presumed that such exercise within reasonable limits was not intended to be prohibited, but rather guaranteed by the general declared purposes of the Constitution. That the courts will not control the exercise of this

power unless it appears beyond reasonable controversy that its exercise was unreasonable, otherwise, the discretion of the Legislature is controlling as to the manner and need of its exercise. That the doctrine that the police power is a necessity may be depended upon to furnish the key as to what is within or what is without such power. That it is not necessary to the exercise of such power that it be absolutely essential to the public welfare, but that the exigencies to be met must concern the public welfare to that extent which may suggest the exercise of such power as a reasonable necessity and remedy. That the Legislature, whether state or municipal, should be the primary judge and the supreme judge as to the reasonableness of conditions calling for an exercise of the power.

It is further said that the following affords a proper test as to the need of the exercise of the power and the reasonableness of the circumstances sustaining its exercise:

> "Does a danger exist? Is it of sufficient magnitude? Does it concern the public? Does the proposed measure tend to remove it? Is the restraint or requirement in proportion to the danger? Is it possible to secure the object sought without impairing essential rights and principles?"

It is then said the judgment of the Legislature is to be taken as correct unless it appears to be wrong beyond a reasonable controversy.

In *Chicago, M. & St. P. Ry. Co. vs. Minneapolis,* 115 Minn. 460, 133 N. W. 169, w volved the question of the right of the exercise of t police power by the city in the interest of its convenience and welfare.

Within the confines of that city there are three lakes, termed "Meandered Lakes." The shores of two of these lakes approach each other within some 600 feet. The disconnecting strip of land was some two or three feet above the water surface of the lakes; long before the city acquired the lakes and before it entered upon the controverted improvement, the railroad company had constructed its tracks on a 100 foot right-of-way passing through about the middle of the disconnecting strip, and in doing so, had erected an embankment of some eighteen feet and constructed its roadbed thereon.

In making the improvements in question, which contemplated a canal from one lake to the other, and through this strip of ground, the city condemned its way across that of the railroad company. The question presented by this case thereupon arose over a claim for damages growing out of the condemnation proceedings. The amount of damages for the various items was agreed upon, the strip of land at $10.00, the cost of required bridge $15,969.00, ornamental features $2,544.00, the city assuming this last item of expense.

The railroad contended that to require it to construct such improvements at its expense would take its property for public purposes without just com-

pensation under both the Constitution of that State and of the United States. That it constituted an excess or abuse of the police power of the city. That the purpose of the requirement was in the interest of the pleasure of the community and its mere convenience and not made necessary for any public highway devoted in the main to the movement of goods and other commercial purposes, it was thereupon said by the court that the general established rule is that where the safety, convenience or the welfare of the public requires a railway company to carry its tracks over a public way or a public way over its tracks by bridge, the uncompensated duty of providing such bridge devolves upon the railway company. That the basis of this rule rests in the superior nature of the public right inherent in the reserved or police power of the state. That the police power of the state is concerned with the convenience and welfare of the public, as well as its safety.

The following statement was taken from the opinion of this court in *C. I. & W. Ry. C., vs. City of Connersville*, 218 U. S. 336, 54 L. ed. 1060, 31 Sup. Ct. Rep. 93:

> "This court has said that the power, whether called police, governmental, or legislative, exists in each state, by appropriate enactments not forbidden by its own Constitution or by the Constitution of the United States, to regulate the relative rights and duties of all persons and corporations within its jurisdiction, and therefore, to provide for the public convenience and the public good."

In *Twin City Separator Co. et al. vs. Chicago, M. & St. P. Ry. Co., et al.,* 118 Minn. 491, 137 N. W. 193, was involved the question of the extent of the city's police power and the nature of its exercise in requiring very extensive and very burdensome depression of its main tracks in that city, as well as serious collaterial resulting injuries to side-track users whose connections were thereby separated from the main track. The city's requirements of the railway company were, that it depress its main track for a distance of some two miles and to a distance of some 18 to 24 feet below the level of the side tracks. Compliance with these requirements were very burdensome upon the railway company and very injurious to the side-track users. However, the railroad company made no contest and the contest arose over the application of the side-track users to prevent a compliance by the railroad with the city's requirements. The court observes that the plaintiff's only status in this case is to attack the validity of the ordinance. And, after discussing what may or what may not have been the purposes of the city respecting side-track users and the effect which the requirement might have upon their property, it is said that such inquiry is here immaterial. It is then observed:

> "Conceding, as must be done, that the city has the power, acting for the general welfare, to order these tracks depressed, it must be held, without regard to collateral consequences, that, since the greater includes the less, if the main track can legally be lowered, the fact that side-tracks are

included therewith and must necessarily be discontinued cannot militate against the legal right of the city to order the alleged improvement or absolve the railway company from the duty of complying therewith. If one person has the legal right to fell a tree, can another object because the branches fall with it?"

"It is vain for the plaintiffs to invoke the sacredness of vested rights and the inviolability of property. The police power is paramount. If it be for the public good that this railroad shall be depressed, this State, and also the municipality, has the right so to require, even though the plaintiff's business be totally annihilated thereby, and this without compensation for the damage done. (p. 198)"

The court then says that it possessed the power to declare the ordinance void if it is unreasonable but that the scope of inquiry in that regard is whether or not the council abused its discretion, and in the absence of such abuse, the courts will not interfere either directly or indirectly. The plaintiffs claimed that the requirements were such as to be an abuse of power. The court said that this is only a statement of the pleader's conclusion. That the facts stated show that inconvenience will result to the appellants and their tenants, that probably their business would be much diminished and that their property will greatly depreciate in value; but that such circumstances alone do not even tend to show the ordinance unreasonable. That consequences of this character frequently result

to property from the elevation of tracks, the building of viaducts and the making of other public improvements, but that improvements are not to be suspended on that account. That the courts have not the power to declare ordinances void for the reasons urged unless the unreasonableness is so greatly manifest and undoubted as to amount to a mere arbitrary exercise of power vested in the legislative body.

In *State vs. United States Express Co.,* (Hamm Brewing Company intervening), 145 N. W. Re. 451, (Iowa), (the case having been very recently decided, has not, as yet, been officially reported), the constitutionality of an act preventing the shipping into territory intoxicating liquors, which were not authorized to be sold in such territory. Sustaining the act, among other things, the court says:

> "The police power is inherent in the state and is given a scope within the state commensurate with what the Legislature reasonably believes to be necessary for the protection and preservation of the health, morals, and welfare of its citizens."

We most respectfully submit that the authorities presented in this brief sustain the exercise of the police power of this city in requiring such reasonable length of viaduct along Dodge Street at the point in question as will best provide for the safety, convenience and welfare of the public in the use of the public streets in and about the location of said viaduct. That the record carries no showing which characterizes the city's requirements as arbitrary and an abuse of power; but on the contrary, abundantly supports the

acts and requirements of the city as those reasonably necessary and required to protect the safety, welfare and convenience of the public use of the streets at that point.

III.

(a) The city is not required to close a street to public travel over which a viaduct is ordered to be built by the railroad.

1. It is contended by appellant that before the city can require it to construct a viaduct the surface of the street under the proposed viaduct must be closed to public travel. That otherwise it is an abuse of discretion. That the existence of a grade crossing is wholly inconsistent with and destructive of any merits in the declaration of the need of a viaduct at the same point. This contention is made under appellant's fifth assignment of error. There is no ground for this contention. The purpose of a viaduct and the extent and scope of the police power are misconceived by appellant. The trial court in passing upon this question aptly said.

> "The complainant asserts that the ordinance is void because the street along which the viaduct is to be erected, is not closed to further travel. It is shown that there are a few places of business so situated that access to them should be reserved by means of grade crossings underneath or along the proposed viaduct. The ordinance is not void because the street is left open, as the statute does not require it to be closed when a viaduct is built over the railway track." (Record, p. 117.)

The Circuit Court of Appeals clearly set forth the law as we view it when it said:

> "It is also urged that the ordinance is void because the grade crossing of the railroad tracks under the viaduct was left open for travel, thereby negativing that necessity for an overhead structure upon which the power of the city depended. This is but another way of asserting that the requirement of a viaduct must be accompanied by a complete vacation or abandonment of the surface crossing—that the city is without power to require a railroad company to build a viaduct for less than all the street traffic. The contention is untenable. The necessity for the safety and protection of the public is the statutory warrant for the ordinance, but its extent is for the judgment of the municipality. Conditions might exist in which a mere foot-bridge for pedestrians would be regarded as sufficient. It is probable that in the present case the grade crossing was left for the convenience of those owning property and doing business under the viaduct and to lessen the injury to abutting property which would follow its vacation. But whether so or not, we cannot say as matter of law, that an abuse of the power conferred by the statute has been shown."

The viaduct that is required to be constructed is primarily for the benefit of the traveling public using Dodge Street. The purpose of the viaduct is to assure a safe passage-way to that public. As to whether or not the viaduct will benefit the railway company in any degree is very debatable and of no legal consequence. It is the duty of the city to provide the traveling pub-

lic, now inadequately protected in its use of the highway, with a safe and secure roadway and this the council of the city is endeavoring to accomplish by requiring appellant to construct the viaduct in question. It is not the duty of the city entirely to close Dodge street from the west to the east end of the proposed viaduct so that no persons may enter upon the street for any purpose, merely because in so doing such persons might go upon the company's tracks laid across the street. The right of the company to cross the street with its tracks is subordinate to the right of the public to use the street for all ordinary purposes.

The statute under which this viaduct was authorized to be ordered, provides for assessing the damages, if any, which may be caused to any person "by reason of the constructing of such viaduct and its approaches." This does not necessarily provide for assessing damages for the closing of the surface of the road to travel. The municipal authorities are given the power to determine the manner of the construction of the viaduct. That is a question submitted, by the Legislature, to them for determination, and not to the railway company.

The city is not required to cut off the ingress and egress to industries located along the course of the viaduct as a prerequisite to its construction. The statute makes no such requirement of it. Neither is it required to assume extra burdens in the nature of claims for damages of property owners along the

course of the viaduct which would arise by reason of closing the street to travel.

In the case of *State ex rel. Omaha vs. U. P. R. R. Co. et al.*, 143 N. W. 918, as yet not officially reported, the Nebraska Supreme Court had before it this same question. The principal defendant there was appellant in this case. The City of Omaha had passed an ordinance requiring certain railroad companies to build a viaduct over their tracks at Nicholas street in that city. The ordinance did not provide for the closing of the surface of the street to travel. It was urged there as it is urged here that the constitutional guarantee of the railroad company had been violated, in that the city was taking the companies' property contrary to the provisions of the constitution of the United States; that the grade crossing would be more dangerous after the viaduct had been constructed than it was before its construction. That the council in leaving the grade crossing open while ordering the construction of the viaduct had acted arbitrary and abused the discretion vested in it and in fact the argument in that case was similar all along the line to that made here. In passing upon the question the court cited with approval the case involved here as reported in the 107 C. C. A. 12, (R. 186) as well as the case of *People vs. U. P. Ry. Co.*, 20 Colo. 186, 37 Pac. 610. Discussing this question the Nebraska Supreme Court said:

"What is a proper viaduct? It is not the province of the railway companies to determine that question as a police regulation. The municipal action which

resulted in the demand for a highway over defendants' tracks, where they cross Nicholas Street, was the exercise of police power—an attribute of sovereignty—committed by the Legislature to the city, but not to defendants. Within constitutional limits, the mayor and council are the sole judges as to when and how such police power shall be exercised. *State v. Withnell*, 91 Neb. 101, 135 N. W. 376, 40 L. R. A. (N. S.) 898. In considering the question presented, defendants' conception of a proper viaduct, therefore, is immaterial, except insofar as it may indicate in some way that the city abused or exceeded its authority. There is no greater merit in the assertion of defendants that the viaduct planned by the city would be detrimental to them in the operation of their trains across Nicholas Street. The statutory justification for the exercise of the police power is 'the safety and protection of the public.' This was the primary object, rather than the convenience of the corporations which created a place of danger, by crossing a public street at grade. * * * *

Notwithstanding the offered proof, it will be presumed that the city, in passing ordinances, acted with full knowledge of the conditions relating to the subject of municipal legislation. *State v. Withnell*, 91 Neb. 101, 135 N. W. 376, 40 L. R. A. (N. S.) 898. While defendants were operating their railways at grade, industries sprung up on adjacent land. The owners thereof may have vested rights. Private individuals own real estate abutting on Nicholas street near the tracks of defendants. The closing of the street may interfere with private rights and damage private property. In passing ordinances it was proper for the mayor and council to consider existing con-

ditions, and to relieve the city and the defendants from unreasonable or unnecessary burdens. The consideration of such burdens may account for the present failure to close the grade crossing. The right of the city to require defendants to construct the viaduct does not depend upon the closing of that part of the street in controversy."

Appellant in its brief finds fault with the language employed by the Circuit Court of Appeals, where it was suggested that the grade crossing might have perhaps been left open for the convenience of those owning property and doing business under the viaduct, and to lessen the injury to abutting property. We would suggest that the city is not required to burden itself with large items of expenses, which must necessarily arise, should abutting property owners be deprived of the surface crossing, so as to make it possible that the railroad company can build a less expensive viaduct. It and not the city has made the street unsafe and it and not the city must bear the burden of restoring the street to its former usefulness. Appellant suggests that it is required only to construct such viaducts as are found necessary for the safety and protection of the public and not for the purpose of convenience. While not conceding the correctness of such contention, we respectfully submit that this viaduct is not required to be built for the purpose of convenience, but to protect the traffic upon the street. The grade crossing has been left open to travel for the convenience of certain of the traveling public, but that is an entirely different matter. That was done so as not to place unnecessary burdens upon the city and

upon abutting property owners, in its attempt to accomplish a conceded necessity to public safety. As the city was not required to assume such burdens or to place them upon the shoulders of the property owners, appellant cannot complain.

2. The statute under which this viaduct was ordered provides for a procedure for determining damages, if any, to the owners of property by reason of the construction of the viaduct. Under this statute the same procedure for determining such damages is fixed as is provided by the charter of the city of Omaha in determining damages occasioned to property owners by the grading of a street or the changing of a street's grade.

Appellant in its brief concludes from this that it was the purpose of the Legislature to treat the construction of a viaduct as equivalent to the change of grade of a street, and that when a viaduct was required to be constructed the surface of the viaduct would be a complete substitute for the surface at the crossing. It is a sufficient answer to say that when this statute was construed by the Nebraska Supreme Court it did not so interpret the statute. And under a familiar rule of this court the statutory construction of a state statute by the highest court of that state will be followed.

But let us analyze this contention of appellant. It would seem to be a far-fetched construction, to say the least of it. At page 51 of Appellant's brief it is said:

> "It is obvious that the purpose of the legislature was to treat the construction of a viaduct as a change of grade of a street."

Now, the change of the grade of a street under the Omah charter does in no way change the actual surface thereof, it only establishes or changes the paper-grade, that is, the grade fixed by the municipal authorities. The surface of the street and the grade of a street need not necessarily correspond and in fact often do not. It will be seen that under no construction could it be contended that the legislature meant to change the grade of a street by establishing a viaduct or to change the general surface of the street by so doing, as we have shown, the actual surface to be traveled would in no way be affected.

This same false reasoning was advanced by the railroad company in *People vs. U. P. Ry., Co.* 20 Colo., 186, 37 Pac. 610, and disposing of the contention the court held:

"The only other ground relied upon by the defendants to overthrow the application of the petitioner for a writ of mandamus is stated as follows: 'That it appears from the petition herein, and from the ordinance therein set forth, that it is proposed by the petitioner to continue and maintain Nineteenth street at a grade as a public thoroughfare across the tracks of these defendants, and at the same time to compel these defendants to construct a new and different thoroughfare over and across the tracks of these defendants without compensation therefor.' The argument in support of this objection is founded upon the principle that if a burden is to be imposed it must be imposed in such a manner as not to inflict upon the defendants unnecessary costs and expenses and to this end it is urged that, as a condition precedent

to the right of the city to compel the erection of a viaduct over the railroad tracks, a new grade for Nineteenth street must be established above, corresponding with the grade of the proposed viaduct, and the street below entirely given over to the use of the defendants or vacated. We think the argument unsound when applied to the case as now presented. It is apparent from the plat, which is made a part of the petition and relied upon by counsel representing all parties, that to entirely vacate Ninteenth street at the surface would be to deprive a large number of people and an extended territory from access by teams to either East or North Denver, while by the ordinance enacted, care has been taken to provide for the accommodation of the public in such a manner as to inconvenience the least possible number of the people, and at the same time to make the burden of constructing the viaduct as light as possible. The cost of a viaduct the full width of the street would certainly be much more than one of the width required by this ordiance."

By requiring the construction of a viaduct at this street crossing, the city did not find, as is intimated on page 47 of appellant's brief, that the crossing was too dangerous to be kept open to travel. All that it found was that to restore the street to its former usefulness and adequately to protect the public travel at this crossing it was necessary that the viaduct in question be constructed.

The contention made under the fifth assignment of error is without merit. The statute does not require the surface crossing to be closed and we feel sure this

court will not read into the statute that which is not there.

3. Again, it is so apparent, that the question presented in this subdivision of the brief must be finally solved by the application of the principles controlling in the exercise of the police power, as to require neither extended statement nor discussion in that regard.

But, before reaching this subdivision we have had occasion herein and as to earlier questions in this brief, to discuss the principles controlling in the exercise of this power, and to note their application to a broad and varied range of conditions and circumstances. Such discussion has been fortified by numerous citations from this and other courts.

We discover no feature or phase in the question presented in this subdivision, which essentially distinguishes it in that regard from the questions heretofore considered. If found sufficient to control the earlier questions herein presented, no added difficulties will be encountered here.

Therefore, as to the police power of the state and its application, we here urge the discussion in the earlier parts and the authorities cited in support thereof.

IV.

Thorughout its brief when it has had occasion to refer to the plans and general specifications, the statement has been frequently made that none of the plans, except those contained in exhibit 1 (R., p. 105) was ever approved by the city council. This statement seems to have been induced by a provision in the stipulation

found on pages 104 and 105 of the record. As we will presently see, this part of the stipulation contradicts directly the positive testimony in the record as well as the admissions of appellant appearing from the record. How this part of the stipulation came to be made as it seems to have been we can only speculate, but we do know that it is in direct contradiction to positive testimony in that regard.

In the fourth subdivision of appellant's brief, such statements are repeated and the contention is strenuously made that the requiring ordinance was void for uncertainty and impossibility of compliance with its requirements. The determination of this question necessarily remits us again to the conditions of the record.

(a) The ordinance of the city, the proceedings of the city council and the plans and specifications were sufficiently definite and certain as to enable easy compliance therewith. The requirements of the statute in these respects were substantially complied with.

1. On page 55 of its brief, appellant admits that an ordinance complete within itself which sufficiently designated regulation, width, height and strength, the material and general manner of construction, would be sufficient for this viaduct and that the company could prepare necessary details of drawing and specifications thereunder. It is said that the vice in the ordinance rests in the fact that it referred to plans and specifications not embodied within it and which in legal effect did not in fact exist. That the city assumed

to legislate by referring to plans and specifications assumed to be in existence. That therefore, the railroad company in attempting to comply with the ordinance must resort not alone to its terms, but to plans and specifications referred to therein.

It may be true that the ordinance referred to plans and specifications, but the plans and specifications referred to in connection with the terms of the ordinance were all-sufficient to enable the railroad company to construct the viaduct substantially as required. We do not understand that this form of legislation is especially objectionable, much less fatally defective. On page 58 of its brief, the company admits it might be required to detail any sufficient plans and specifications and thereby to construct the viaduct substantially required. Of course, it urges that no such general plans and specifications were in existence at the time of the enactment of the ordinance and that therefore, the city had so blundered and confused its own proceedings as to make compliance with the terms of the ordinance impossible.

Was exhibit 2, the alternate plans, (R. p. 105) ever approved by the city council? The following endorsement on the face of the exhibit, lower right-hand corner, appears:

> "Original blue print approved, is on file in vault, room 403. Approved by city council July 13, 1909; approved by mayor July 15, 1909."

This very notation was offered at the time the exhibit was offered and as a part thereof by appellant,

and admitted (R. p. 31). This plan was approved by the city council (R. pp. 26-30). Counsel for appellant treated and referred to this plan as adopted. (R. pp. 29-30).

The original plans for viaducts and its revision in March, 1909, being exhibit 1 and 2, respectively, were the plans for the Dodge street viaduct (R. pp. 27-28). Original specifications for viaducts were prepared in June, 1908, and filed with the city clerk (R. p. 29). These specifications were revised in December, 1909, (R. p. 30). The revised specifications were approved on July 12, 1910, (R. p. 30). These specifications appear in the record as exhibits 3 and 4, respectively, (R. pp. 106-124). Each exhibit was introduced as having been duly approved, including the endorsement showing aproval, exhibit 3, on June 12, 1908, exhibit 4 on July 13, 1910, (R. p. 31). Exhibit 5 (R. p. 43) is admitted to be and understood as an unofficial copy of general specifications used for the convenience of the engineer's office (R. pp. 32-33). This unofficial copy, however, is said to be a duplicate copy of the specifications in exhibit 4 (R. p. 33).

Appellant received a copy of the ordering ordinance in the middle of April, 1910 (R. pp. 34-35). Appellant's engineer in charge examined the specifications for this viaduct in April (R. p. 35). At the same time he received both the original and alternate plans (R. p. 36). Under plans and specifications given appellant's engineer, he could have constructed the viaduct in question

(R. p. 38). At the time the claim was made in appellant's bill herein that the plans and specifications were insufficient to enable it to construct the viaduct in question, its engineer had not so reported to it in that regard and it had received no such information from any known source (R. pp. 49-50). The alternate plan, aside from the change in length, fits into and may properly be considered as a part of the original plan (R. p. 52). From the plans and specifications furnished, appellant's engineer could prepare the necessary details (R. p. 53). The principal objection made by appellant's engineer to the plans and specifications, or rather to the construction of the viaduct in that regard, was the fact that the time for commencement was made too short (R. pp. 53-54). The plans contained in exhibits 1 and 2 were construed by the engineering department of the city and intended to go together (R. p. 79) Appellant's engineer and other of its officers had been frequently shown the plans and specifications and had gone over the specifications with the city's engineer (R. p. 79). As to viaducts, it had been the practice and custom of the city simply to prepare general specifications (R. p. 82). Appellant's engineer was given both plans (R. p. 91). The alternate plan was not intended to be complete and is to be used in connection with the original (R. pp. 91-92).

2. Extended additional statement and comment with respect to what the record shows in relation to the plans and specifications for this viaduct becomes quite unnecessary in as much as the record speaks for

itself. Briefly, it shows the preparation of two plans, one an original which was revised and that became an alternate plan to the original; these two were prepared and intended as one plan showing the general features, dimensions and parts. They were not intended as a picture of every detail and this was understood by appellant. Two specifications were prepared, the first, an original, and the second, a revision thereof, in a large way detailing the main features, connections and parts of the structure as to material, connections and relations, and were not intended as minute details of the completed structure nor were they so understood by appellant.

The engineer of appellant admits in this record that as an engineering proposition and from the plans and specifications furnished him on the occasion or given him by the engineering department, in connection with the requiring ordinance, he could have prepared the details necessary to a substantial compliance therewith and in that connection, largely claimed that the time given was too short. So that the real controversy before the trial court was that of shortness of time in which to begin the work rather than any insufficiency or want of certainty in the plans and specifications.

While some statements in the record might indicate in a measure the lack of a degree of certainty which might be desirable in respect to the plans and specifications, yet the record as a whole must be regarded as convincing that the principal complaint of appellant when it filed its bill and tried its cause in the lower

court, was one directed against the time requirements in which to begin work rather than any discovered want of certainty in the proceedings of the council. It is now too late, even assuming some merit in its contention, for it to amend its holding and insist upon uncertainty.

It must be quite manifest from a study of the record that appellant has not and will not suffer because of any informalities in the plans and specifications; unless, perhaps, it might have required it a little longer time to have begun work, than it otherwise would if the city had prepared completed plans and completed detailed specifications.

This complaint of appellant has been presented to two courts, largely, we assume, as here presented, and the decision of each of the courts in respect thereto indicate no great difficulty on the part of the court in arriving at the views we have undertaken to express in relation thereto.

The trial court (R. p. 177) says:

> "The evidence shows that such plans and specifications theretofore had been prepared. While they were lacking in some details, yet they were sufficient to enable the railway company to proceed in substantial conformity to the ordinance. If more detailed specifications were needed, its own engineer could readily supply them. The viaduct might be lacking in some things that the city had power to require, but the plans and specifications, so far as they went, have not been shown to be unintelligible or incapable of being followed."

We most respectfully submit that this seems to be the only view which could be consistently taken in respect to the admissions of appellant's own engineer.

As to the above, the Circuit Court of Appeals (R. p. 189), says:

> "Again, it is claimed the ordinance is void because the plans and specifications were too incomplete and indefinite to enable the company to proceed, and also because it was required under penalties of a misdemeanor to commence erection and construction within an impossibly short period. The plans are somewhat confused but we think that when taken as a whole, they are not subject to the objection made. The plans subsequent to those first made were undoubtedly intended and should be taken as a modification. The very ordinance which is attacked so indicates. The time limited for the commencement of work is short, but the ordinance does not mean a beginning of the physical structure to the exclusion of the usual preparations in good faith, which necessarily precede the breaking of ground."

3. It is insistently contended in appellant's brief that the terms "erection and construction" as used in the statute and in the ordinance mean and meant actual physical work on the viaduct or some part of it and that failure to begin actual physical work as aforesaid within the prescribed time, would have exposed it to the penalties carried in the ordinance.

The views of the Circuit Court of Appeals, as we have shown in this regard, were contrary to this con

tention, and doubtless the city would have been
than satisfied had appellant began the good faith
arations of the plans within the prescribed time.
ever may have been or may be the proper constr
of the terms so employed, we know of no purp
the part of the city to seek an enforcement of th
alties against the company. We can now think
objections to making provisions by decree of this
for protecting appellant against the enforcement
penalties carried in the ordinance, if resting up
grounds and views that appellant has in good fait
not for the purpose of delaying, sought in this
to determine its rights in respect to the various re
ments of the city relating to the construction
viaduct in question. However, we do not wan
concession to put the city in the attitude that i
wrong or qualifiedly incorrect in making and ins
upon the requirements in manner and form as ma

4. In concluding, we desire most emphatica
disclaim that it was the purpose of the city, in
the penalties in the ordinance in the amounts th
fixed, to prevent or to obstruct appellant from r
ing to the courts to present and to try out wha
rights it may have had, or conceived itself to hav
which were threatened, in any way relating to the
requirements that appellant proceed to constru
viaduct in question. Its sole purpose in that r
being to fix and provide such reasonable penalti
thought proper and expedient to induce a compl

he ordiance of the city and the laws of the State,
ıg to the construction of viaducts, when ordered.

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